Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

LUCAS P. BAEZ,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held, in conflict with rulings of the Third, Sixth, Eighth and Ninth Circuits, that Section 106(c) of the Immigration and Nationality Act precludes judicial review of final orders of deportation after an alien has been deported, even if the deportation was illegally executed and/or violated the alien's rights under the Due Process Clause of the Fifth Amendment to the United States Constitution.

2. If so, whether Congress constitutionally can preclude judicial review of final agency adjudications to consider claims asserting colorable violations of the Due Process Clause of the Fifth Amendment to the United States Constitution.

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Gade v. National Solid Wastes Management Ass'n, 112 S. Ct. 2374 (1992) 21

Garcia v. United States, 469 U.S. 70 (1984) 19

Gonzalez-Julio v. INS, 34 F.3d 820 (9th Cir. 1994) . . . 14

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Heikkila v. Barber, 345 U.S. 229 (1953) 26

Joehar v. INS, 957 F.2d 887 (D.C. Cir. 1992) 9

Johnson v. Robison, 415 U.S. 361 (1974) 22

Juarez v. INS, 732 F.2d 58 (6th Cir. 1984) . . 6, 9, 12, 13

King v. St. Vincent's Hospital, 502 U.S. 570 (1991) . . . 19

Kungys v. United States, 485 U.S. 759 (1988) 20

Lynch v. Overholser, 369 U.S. 705 (1962) 22

Marozsan v. United States, 852 F.2d 1469 (7th Cir. 1988) 23, 24

Marrero v. INS, 990 F.2d 772 (3d Cir. 1993) . . . 6, 10, 12, 13, 14, 20

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Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) . . 24, 25

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Saadi v. INS, 912 F.2d 428 (10th Cir. 1990) 6, 11

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Wong Yang Sung v. McGrath, 339 U.S. 33 (1950) 26

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U.S. CONST. AMEND. V . . . . . *passim*

Statutes and Regulations

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Section 106(a), 8 U.S.C. § 1105a(a) 17

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Section 106(c), 8 U.S.C. § 1105a(c) . . . . . *passim*

Section 212(c), 8 U.S.C. § 1182(c) 3, 13

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Section 242(f), 8 U.S.C. § 1252(f) 19

Section 244(e), 8 U.S.C. § 1254(e) 19

Section 273(d), 8 U.S.C. § 1323(d) 19

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8 C.F.R. § 243.3(b) 13

8 C.F.R. § 264.1(d) 19

8 C.F.R. § 292.5 13

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T. Aleinikoff & D. Martin, IMMIGRATION: PROCESS AND POLICY (2d ed. 1991) 15, 20

A. Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443 (1989) 23, 24

P. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233 (1990) 23

Comment, *Deportation and Exclusion: A Continuing Dialogue Between Congress and the Courts*, 71 YALE L.J. 760 (1962) 18, 20

K. Davis, ADMINISTRATIVE LAW TREATISE (2d ed. 1984) 28

R. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988) 24, 25

R. Fallon, Jr. *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309 (1993) 22, 23, 27, 28

G. Gordon & S. Mailman, IMMIGRATION LAW AND PROCEDURE (1994) 20

H.M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953) . 25, 276

H.R. Rep. No. 1086, 87th Cong., 1st Sess. (1961), reprinted in 1961 U.S.C.C.A.N. 2950 18

D. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291 (1990) 23

H. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983). 23

R. Pierce, Jr., ADMINISTRATIVE LAW AND PROCESS (2d ed. 1992) 27

B. Schwartz, ADMINISTRATIVE LAW (3d ed. 1991) 27

G. Young, *Public Rights and the Federal Judicial Power: From Murray's Lessee Through Crowell to Schor*, 35 BUFF. L. REV. 765 (1986) 24, 28

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Lucas P. Baez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-14a) is reported at 41 F.3d 19. The decisions of the Board of Immigration Appeals (App., *infra*, 17a-28a) are unreported. The decision of the immigration judge (App., *infra*, 29a-41a), is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 106(c) of the Immigration and Nationality Act, 8 U.S.C. § 1105a(c), provides, in pertinent part, that "[a]n order of deportation or of exclusion shall not be reviewed by any court if the alien * * * has departed from the United States after the issuance of the order." Section 106 is reproduced in its entirety at App., *infra*, 44a-48a. The Due Process Clause of the Fifth Amendment to the United States Constitution provides that "No person shall be * * * deprived of life, liberty, or property, without due process of law." U.S. CONST. AMEND. V. Article III of the United States Constitution is reproduced in its entirety at App., *infra*, 42a-43a.

STATEMENT

This case presents for review the question left open by this Court in *United States v. Mendoza-Lopez*, 481 U.S. 828, 837 & n.13 (1987), of whether final orders of deportation are subject to judicial review after an alien has been deported. The court of appeals, in conflict with decisions of the Third, Sixth, Eighth and Ninth Circuits, held that § 106(c) of the Immigration and Nationality Act ("INA") categorically bars judicial review of such orders once an alien is deported—even if the deportation is illegally executed and violates the alien's rights under the Due Process Clause of the Fifth Amendment to the Constitution. In reaching that conclusion, the court followed similar rulings by the Second, Fifth and Tenth Circuits.

As the court of appeals recognized, "[t]he courts of appeals have divided on whether this statute signifies what it

appears to say." App., *infra*, 1a-2a. In fact, the courts of appeals have split in at least three different directions in attempting to discern the jurisdictional significance of § 106(c), so much so that the courts have recognized that "[o]bviously, the question of how deportation affects an alien's right to make various claims in court calls for resolution by the Supreme Court." *Bar-Levy v. United States Dep't of Justice*, 990 F.2d 33, 36 (2d Cir. 1993). This Court should grant the petition to resolve the conflict among the circuits on this important and recurring question of law.

1. Petitioner Lucas P. Baez is a native of the Dominican Republic who entered the United States as a lawful permanent resident on April 20, 1972, at the age of 12. On March 5, 1987, the INS issued an order to show cause charging petitioner with deportability, based upon his conviction for distribution of a controlled substance. At the hearing before the Immigration Judge, petitioner conceded deportability, but sought relief from deportation under Section 212(c) of the Act, 8 U.S.C. § 1182(c), based upon evidence of his rehabilitation, remorse and extensive family ties in the United States, including two financially-dependent children, his parents, two brothers and two sisters. On June 16, 1989, the Immigration Judge granted petitioner's application for relief from deportation "[b]ased on the favorable factors of extended residence, family ties, the number of letters attesting to [petitioner's] rehabilitation and [the fact that he is] no longer involved in any criminal matter, and a separation that would be caused to his children and family* * *." App., *infra*, 40a-41a.

2. The INS appealed to the Board of Immigration Appeals in July 1990, after which the case laid dormant for more than 3 years. On September 30, 1993, the Board, in a split decision, reversed the Immigration Judge's decision, citing various "adverse factors" presented by petitioner's case, but overlooking the favorable factors relied upon by the Immigration Judge.

Board Member Mary Maguire Dunne dissented, concluding that "[t]he immigration judge carefully and fully weighed and balanced the adverse factors in this case against the favorable factors and found that [petitioner] had established that he should be granted discretionary relief from deportation. Without pointing to a single factual or legal error on the part of the immigration judge in reaching his decision, the majority simply substituted its judgment for his." App., *infra*, 28a.

Petitioner's counsel, Paul F. Murphy, never was served with a copy of the Board's decision. On November 22, 1993, at 11:15 p.m., Murphy received a telephone call at his home from petitioner's sister, who informed him that petitioner had been taken into custody by INS officers for the purpose of deporting him. Counsel telephoned the INS detention center from his home early on November 23, and was then informed for the first time that petitioner's grant of relief from deportation had been reversed by the Board and that petitioner would be deported later that day. Having not yet seen a copy of the Board's decision or reviewed petitioner's file in more than 3 years, counsel quickly prepared an emergency motion for stay of deportation and to reopen the proceedings before the Board based upon the fact that he had not been properly served with or notified of the Board's decision, and had not been given sufficient time to petition the court of appeals for review. Counsel filed the motion with the local Immigration Judge at approximately 12:00 p.m. on November 23, at which point he obtained a copy of the Board's decision. The Immigration Judge forwarded petitioner's motion to the Board via facsimile. At 1:00 p.m., counsel provided an oral statement to the sole Board Member then available via telephone in which he explained that he had not been served with a copy of the Board's decisions and did not have sufficient notice of petitioner's deportation. At approximately 4:30 p.m., counsel received

a telephone call advising him that the motion for stay had been denied. App., *infra*, 3a-4a, 18a.

Petitioner was deported during the early morning hours of November 24—less than 36 hours after his counsel was notified of the impending deportation, and only 18 hours after counsel obtained a copy of the Board's decision and final order of deportation. On December 13, the Board denied petitioner's motion to reopen by operation of law based solely upon the fact that he had been deported. App., *infra*, 17a.

3. Petitioner filed a timely appeal with the First Circuit, challenging the Board's decision denying him relief from deportation and denying his motion to reopen. The INS moved to dismiss the appeal pursuant to § 106(c) of the Act, arguing that petitioner's deportation precluded judicial review of the Board's orders. Petitioner opposed the motion on the grounds that counsel had not been properly notified of the Board's final order of deportation or of the deportation itself.

The court of appeals, noting that "courts have split on the question of whether [§ 106(c)'s] jurisdictional bar is subject to a due process exception," ordered the parties to brief "the issue of whether counsel's eleventh-hour notice of the scheduled deportation might trigger a possible exception to [§ 106(c)] -- a matter of some dispute." App., *infra*, 15a-16a. Ultimately, however, the court held that despite petitioner's claims that his deportation was executed without proper notice to counsel and violated his right to due process, the court was "powerless to reach the merits of these asseverations * * * for petitioner's deportation deprives this court of subject matter jurisdiction over the request for judicial review." App., *infra*, 7a.

In examining the question of subject matter jurisdiction, the court of appeals explained that "the statute's plain meaning must prevail, and, therefore, an alien's departure from the United States, whether voluntary or involuntary, deprives the

federal courts of jurisdiction to entertain challenges to an antecedent order of deportation. Because the instant petition solicits judicial inquiry into the correctness of the deportation order that brought about petitioner's departure, we dismiss it for want of appellate jurisdiction." App., *infra*, 2a.

The court acknowledged that other circuits, following the Ninth Circuit's decision in *Mendez v. INS*, 563 F.2d 956 (1977), "have read exceptions into [§ 106(c)], thereby softening its impact and authorizing post-deportation review under certain circumstances." App., *infra*, 8a-9a, citing *Zepeda-Melendez v. INS*, 741 F.2d 285, 287-88 (9th Cir. 1984); *Thorsteinsson v. INS*, 724 F.2d 1365, 1367-68 (9th Cir.), cert. denied, 467 U.S. 1205 (1984); *Estrada-Rosales v. INS*, 645 F.2d 819, 820-23 (9th Cir. 1981); *Juarez v. INS*, 732 F.2d 58, 59-60 (6th Cir. 1984); *Camacho-Bordes v. INS*, 33 F.3d 26, 27-28 (8th Cir. 1994); *Marrero v. INS*, 990 F.2d 772, 777 (3d Cir. 1993). The court noted, however, that "[a]t least three other circuits have given *Mendez* a distinctly unfavorable reception." App., *infra*, 9a, citing *Umanzor v. Lambert*, 782 F.2d 1299 (5th Cir. 1986); *Quezada v. INS*, 898 F.2d 474, 476-77 (5th Cir. 1990); *Saadi v. INS*, 912 F.2d 428, 428 (10th Cir. 1990); *Roldan v. Racette*, 984 F.2d 85, 90 (2d Cir. 1993).

After examining these conflicting interpretations of § 106(c), the court rejected *Mendez* and sided with those circuits that have read the statute as an absolute bar to post-deportation judicial review. App., *infra*, 10a. The court also held that judicial review is unavailable even if the deportation colorably violates the alien's constitutional right to due process:

> A judge-made exception to section [106(c)'s] jurisdictional bar, even one limited to "colorable" due process claims--whatever that term may eventually come to mean--can too easily expand to engulf the

> general rule prohibiting review and thereby thwart achievement of the congressional goal.

App., *infra*, 12a (citation omitted). The court further concluded that this "strict construction that the language of the statute demands passes constitutional muster. Congress has broad discretion to restrict access to the lower federal courts. Hence, we perceive no constitutional infirmity in the outright denial of appellate review following an alien's deportation." App., *infra*, 12a n.7 (citation omitted).

Based upon this reasoning, the court held (App., *infra*, 12a), that it lacked jurisdiction to review the Board's final order of deportation and its denial of petitioner's motion to reopen:

> We join those of our sister circuits that have followed the plain language of section [106(c)] and found its jurisdictional bar to be absolute. Reading the statute in that manner, the petitioner's involuntary departure from the United States deprives us of jurisdiction to examine the correctness of either the underlying deportation order or the Board's disposition of the motion to reopen. Accordingly, the petition for judicial review is dismissed.

REASONS FOR GRANTING THE PETITION

The First Circuit's ruling that § 106(c) bars post-deportation judicial review of final orders of deportation conflicts with decisions of four other circuits and cannot be reconciled either with the plain meaning of the statute or the guarantees of judicial review contained in Article III of the United States Constitution and the Due Process Clause of the Fifth Amendment. Courts and commentators alike that have addressed these issues have widely acknowledged the tremendous confusion they have caused among the lower courts, and have urged this Court to review these issues.

For these reasons, and because the questions presented are certain to recur given their broad application to judicial review of final orders of deportation and other forms of agency action, this Court should grant the petition.

I. THE COURT OF APPEALS' DECISION THAT § 106(C) PRECLUDES POST-DEPORTATION REVIEW OF FINAL ORDERS OF DEPORTATION CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS

The court of appeals' decision in this case raises fundamental questions concerning the rights of aliens illegally deported by the INS to seek judicial review and to safeguard the constitutional rights guaranteed them by the Due Process Clause of the Fifth Amendment and Article III of the Constitution. On this significant issue, the courts of appeals are hopelessly deadlocked and have openly invited review by this Court.

A. As the ruling below confirms, the federal courts are irreconcilably split over the question of whether § 106(c) of the Act bars post-deportation review of final orders of deportation. The First Circuit, in holding that the statute categorically precludes such review, expressly refused to follow the Ninth Circuit's decision in *Mendez v. INS*, 563 F.2d 956 (1977). In *Mendez*, the Ninth Circuit held that § 106(c) does not preclude post-deportation review where the deportation is effectuated without proper notice to the alien's counsel.

> We are of the opinion that "departure" in the context of [§ 106] cannot mean "departure in contravention of procedural due process." We hold that "departure" means "legally executed" departure when effected by the government. We base our holding on the Supreme Court's decision in *Delgadillo v. Carmichael*, 332 U.S. 388, 68 S. Ct. 10, 92 L. Ed. 17 (1947). In that case the Court held that an alien does not make an "entry" into the United States

> when he had no intent to "depart," or left involuntarily. * * * Appellee's contention that its decisions are immune from judicial review when the alien is physically out of the country without regard to the manner in which this "departure" was accomplished is just such a "captious interpretation."

Mendez, 563 F.2d at 958-59. Judge Trask's decision in *Mendez* consistently has been followed in the Ninth Circuit, and has since been adopted by the Sixth Circuit as well. See, *e.g.*, *Hajnal v. INS*, 980 F.2d 1247, 1247-48 (9th Cir. 1992) ("[i]t is well-established in our Circuit that § [106(c)] applies only in cases where the departure was 'legally executed'"); *Juarez v. INS*, 732 F.2d 58, 59-60 (6th Cir. 1984) ("'departure' in this context has been held to mean a 'legally executed' departure that does not violate procedural due process. * * * If [the alien] had left the United States under an order that contravened his constitutional right to due process, his departure would be no obstacle to court review of the order") (citing *Mendez*).[1]

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[1] Accord, *e.g.*, *Arreaza-Cruz v. INS*, 39 F.3d 909, 910-11 (9th Cir. 1994) (same); *Wiedersperg v. INS*, 896 F.2d 1179 (9th Cir. 1990) (alien entitled to post-deportation review in order to reopen proceedings where original deportation was based solely on invalid conviction); *Zepeda-Melendez v. INS*, 741 F.2d 285, 286 (9th Cir. 1984) ("[w]e hold that the court has jurisdiction to review a deportation order where an alien's departure was not lawfully executed, and we conclude that deportation without notice to the alien's counsel is not a lawful departure"); *Estrada-Rosales v. INS*, 645 F.2d 819, 820 (9th Cir. 1981) (in post-deportation proceedings "an alien may properly petition for review of his deportation when he seeks to challenge the regularity of the deportation proceeding"); *Thorsteinsson v. INS*, 724 F.2d 1365, 1367-68 (9th Cir.), cert. denied, 467 U.S. 1205 (1984) (same). See also *Joehar v. INS*, 957 F.2d 887, 889-90 (D.C. Cir. 1992) (noting that "[i]f there is any exception to the strict rule that a nonresident alien may not seek judicial review of

The Third and Eighth Circuits likewise have held that § 106(c) does not bar judicial review if the deportation violates the alien's due process rights. See, *e.g.*, *Camacho-Bordes v. INS*, 33 F.3d 26, 28 (8th Cir. 1994) ("we hold that, under [§ 106(c)], we have jurisdiction to review an order of deportation, after the alien has been forcibly deported, if the record reveals a colorable due process violation"); *Marrero v. INS*, 990 F.2d 772, 777 (3d Cir. 1993) (same); *Newton v. INS*, 622 F.2d 1193, 1195 (3d Cir. 1980) (noting that failure to provide proper notice to counsel in advance of alien's deportation would render the deportation "invalid because of this denial of procedural due process"). *Cf. Cipriano v. INS*, 24 F.3d 763, 764 (5th Cir. 1994) (permitting post-departure review of allegedly unconstitutional deportation order, and noting that the Court in *Mendoza-Lopez* "explicitly reserved the question at issue herein: whether post-departure judicial review of an allegedly unconstitutional deportation order is available in the context of deportation proceedings").

The First Circuit, on the other hand, in sharp conflict with these decisions, followed rulings of the Second, Fifth, and Tenth Circuits that final orders of deportation are immune from judicial scrutiny once an alien's deportation is carried out by the INS. See *Roldan v. Racette*, 984 F.2d 85, 90 (2d Cir. 1993) ("[w]e agree with the courts that have criticized *Mendez*. The

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a deportation proceeding, it involves an allegedly 'illegally executed' deportation," although venturing "no opinion upon the validity of that putative exception"); *Umanzor*, 782 F.2d at 1305 (Brown, J., dissenting) (citation omitted) ("Allowing the INS to effect such a 'departure' without notifying the alien's attorney would thwart an appellate court's jurisdiction to review deportation orders. I think the Ninth Circuit in *Mendez* was absolutely correct in deciding that a departure cannot bar judicial review when the alien's lawyer has received no notice of the order to report for deportation * * *").

pertinent language of § [106(c)] constitutes a clear jurisdictional bar, and admits of no exceptions"); *Umanzor v. Lambert*, 782 F.2d 1299 (5th Cir. 1986) (same); *Quezada v. INS*, 898 F.2d 474, 476-77 (5th Cir. 1990) (same); *Saadi v. INS*, 912 F.2d 428, 428 (10th Cir. 1990) (same). In *Umanzor*, the Fifth Circuit first expressed the rationale for interpreting § 106(c) as an absolute jurisdictional bar:

> We entertain serious reservations regarding the "*Mendez* exception" for, if the exception is taken to its logical conclusion, any error or procedural defect at any point in the alien's deportation saga * * * would render the departure illegal. This being so, any later allegation of procedural error by a deported alien would force the district court and the circuit courts to review the entire matter, despite the express determination of Congress that no such reviews should take place. Our reservations regarding the *Mendez* exception are reinforced by the course of its development in the circuit of its origins, the Ninth, where *Mendez* has become a sinkhole that has swallowed the rule of § [106(c)].

Umanzor, 782 F.2d at 1303 & n.5. See also *Quezada v. INS*, 898 F.2d 474, 476 (5th Cir. 1990) ("we reject *Mendez* today, as we did in *Umanzor*. * * * [W]e conclude that Congress 'meant what it said' when it provided that 'no court' may review a deportation order once deportation has occurred").

The conflict between the *Mendez* and *Umanzor* lines of circuit authority is undeniable and has been widely recognized. See, *e.g.*, *Roldan*, 984 F.2d at 89 ("[n]otwithstanding the unambiguous language of the statute, there is some conflict among the circuits as to the meaning of the provision of § [106(c)] at issue in this case") (describing conflict between *Mendez* and *Umanzor* lines of decisions); *Bar-Levy*, 990 F.2d

at 36 ("there is a sharp conflict among the circuits as to the meaning of the jurisdictional bar set forth in § [106(c)]"); *Camacho-Bordes*, 33 F.3d at 27 ("[t]here is a split among the circuits as to the meaning of 'departed' in INA § 106(c)"); *Motta v. District Director*, 869 F. Supp. 80, 87 n.7 (D. Mass. 1994) ("[t]here is a split among the circuits concerning the scope of Section [106(c)]").

The need for review of the question presented in this case is apparent not only because of the circuit split it has engendered but also because of the serious burden it has imposed on the federal court system. Indeed, the confusion in the circuits runs far deeper than just the question *whether* final orders of deportation are subject to post-deportation judicial review, but also *when* such review is permissible. Four circuits, including the First Circuit below, have interpreted § 106(c) as an absolute "jurisdictional bar," under which "no court' may review a deportation order once deportation has occurred." *Quezada*, 898 F.2d at 477. See also, *e.g.*, *Roldan*, 984 F.2d at 90 (same). The Sixth and Ninth Circuits, on the other hand, have taken the view that § 106(c) is a "general rule" that only precludes judicial review where a "departure" is "legally executed." *Mendez*, 563 F.2d at 958; *Juarez*, 732 F.2d at 59-60 (adopting *Mendez* rule). The Third and Eighth Circuits in turn have adopted "a middle ground and hold that [a court] has jurisdiction to review an order of deportation after the alien has been forcibly deported if the record reveals a colorable due process claim." *Marrero*, 990 F.2d at 777. Accord *Camacho-Bordes*, 33 F.3d at 28 ("we agree with the analysis in *Marrero v. INS* and adopt the Third Circuit's middle position between the Ninth Circuit's *Mendez* exception and the Fifth Circuit's strict lack of jurisdiction view").

B. The prejudice to petitioner and others similarly situated resulting from this circuit conflict is readily apparent. Indeed, had petitioner resided within any of the four circuits

that permit post-deportation judicial review, he would have been afforded the right not only to challenge the Board's final order of deportation and its arbitrary denial of § 212(c) relief, but also to seek judicial review of the INS' "eleventh-hour notice" of his deportation and its unconstitutional deprivation of his right to counsel.

Under the law of the Sixth and Ninth Circuits, for example, petitioner would have been entitled to post-deportation review since his deportation was not "legally executed." *Juarez*, 732 F.2d at 59-60; *Mendez*, 563 F.2d at 958-59. Indeed, each of those Circuits has held that the INS' failure to follow its own regulations justifies post-deportation review. See *Mendez*, 563 F.2d at 959; *Juarez*, 732 F.2d at 59. In this case, it is indisputable that the INS violated petitioner's statutory right to counsel and its own regulations by failing to provide counsel with 72 hours notice of petitioner's deportation, and by failing to serve him with a copy of the Board's final order of deportation. See 8 C.F.R. § 243.3(b) (requiring 72 hours notice of deportation); 8 C.F.R. § 292.5 (requiring notice to counsel representing alien). See also *Zepeda-Melendez*, 741 F.2d at 288 (holding that §§ 243.3(b) and 292.5 require 72 hours notice to counsel before deportation, and that "[a]t a minimum, an alien's counsel must be made aware of the alien's deportation in order to provide representation. We hold, therefore, that the agency's deportation of Zepeda without notice to his counsel violated Zepeda's section 1252(b) right to counsel"); *Mendez*, 563 F.2d at 959 (reversing deportation order because failure to notify counsel of deportation violated INS regulations).

Petitioner likewise would have been afforded post-deportation review under Third and Eighth Circuit law as well since the record below plainly reveals a "colorable" due process violation. See *Marrero*, 990 F.2d at 777; *Camacho-Bordes*, 33 F.3d at 28. In the first place, the INS violated petitioner's right to due process by impeding his statutory right to counsel and

failing to give counsel 72 hours notice of his deportation. 8 U.S.C. § 1252(b); 8 C.F.R. § 243.3; 8 C.F.R. § 292.5. Indeed, the record shows that counsel *never* received such notice from the INS, and that the few hours' notice he received from petitioner's family provided no meaningful opportunity either to review the Board's final order of deportation or to consider and/or pursue any appellate remedies. *Cf. Gonzalez-Julio v. INS*, 34 F.3d 820, 825 (9th Cir. 1994) (holding that regulation granting aliens *10 days* in which to appeal to the Board provided insufficient time to appeal and thus violated due process requirements because "the risk of erroneous deprivation of the petitioner's interest in filing an appeal is substantial"). Under the circumstances of this case, the Third and Eighth Circuits each have recognized a violation of procedural due process. *Marrero*, 990 F.2d at 777 (failure to serve attorney supported by record constituted colorable procedural due process violation claim); *Newton v. INS*, 622 F.2d 1193 (3d Cir. 1980) (failure properly to notify counsel can constitute denial of procedural due process).

The INS' failure to provide timely notice to counsel of petitioner's deportation also constituted a violation of his Fifth Amendment due process right to counsel, and likewise would have entitled petitioner to post-deportation review in any of the four circuits that permit such review. It is well-established that the Due Process Clause protects the rights of aliens to be represented by counsel of their choice in cases such as this where the absence of counsel would be prejudicial. See, *e.g.*, *Baires v. INS*, 856 F.2d 89, 91 & n.2 (9th Cir. 1988) ("if prejudice to the alien is sufficiently great, the constitutional guarantee of due process may be violated"); *United States v. Saucedo-Velasquez*, 843 F.2d 832, 835 n.2 (5th Cir. 1988) ("[a]n alien does * * * have a right to counsel if the absence of counsel would violate due process under the Fifth Amendment"). This right to counsel includes not only right to retain

counsel, but to have counsel meaningfully perform his or her functions without governmental interference. See *Baires*, 856 F.2d at 91 n.2 ("[w]e have characterized the alien's right to counsel of choice as 'fundamental' and have warned the INS not to treat it casually. As we have also said, that right must be respected in substance as well as in name"). Here, the INS' "eleventh-hour notice" (App., *infra*, 16a) of petitioner's deportation and its failure to serve counsel with the Board's final order of deportation clearly deprived petitioner of his statutory and constitutional right to counsel, and would have entitled him to post-deportation review in any of the four Circuits that permit it.

In sum, the importance of resolving the meaning the meaning of § 106(c) has been widely acknowledged by the courts and commentators that have addressed the issue. The courts have struggled for almost twenty years since *Mendez* was first decided to determine the availability and scope of post-deportation judicial review, and have failed to reach any consensus. Since this Court left the question open in *United States v. Mendoza-Lopez*, 481 U.S. at 837 & n.13, the courts of appeals have taken three sharply conflicting approaches to resolving this question, and with time have become hopelessly deadlocked. Recently, the circuits thus have treated this as an "open" question "explicitly reserved" by this Court (App., *infra*, 10a n.5; *Cipriano*, 24 F.3d at 764 & n.9), and have recognized it as one that "calls for resolution by the Supreme Court." *Bar-Levy*, 990 F.2d at 36. See also T. Aleinikoff & D. Martin, IMMIGRATION: PROCESS AND POLICY 933-34 (2d ed. 1991) (noting circuit split over availability of post-deportation review). For all of these reasons, review of this question by the Court is warranted.

II. THE COURT OF APPEALS' HOLDING THAT § 106(C) PRECLUDES POST-DEPORTATION REVIEW OF FINAL ORDERS OF DEPORTATION DISREGARDS THE PLAIN MEANING OF THE STATUTE

In construing the term "departed" in § 106(c) to include deportations, and by interpreting the statute to mean that the INS can avoid judicial review of deportation orders simply by carrying them out, the First Circuit below not only disregarded the statute's plain meaning and the particular use of the term "depart" throughout the INA, but it also overlooked the entire scheme of judicial review established in § 106. Indeed, the First Circuit's ruling reflects precisely the sort of "captious interpretation" of the INA which this Court rejected in *Delgadillo v. Carmichael*, 332 U.S. 388 (1947).

A. On its face, § 106(c) precludes judicial review of a deportation order once an alien "has departed from the United States after issuance of the order." In its ruling below, the First Circuit held that the term "departed" must be interpreted to include not only voluntary departures, but involuntary departures (*i.e.*, deportations) as well:

> we do not believe that there is any principled way to interpret the word "departed" as failing to encompass the most relevant type of departures--involuntary departures by way of deportation. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 604 (1986) (defining "depart" to include "to go forth or away: set forth: LEAVE").

App., *infra*, 11a. Yet, in looking to the dictionary to support its reading of the statute, the court of appeals overlooked the contrasting usages and meanings of the terms "deport" and "depart" throughout the INA, and altogether ignored the remaining text of § 106(c), which likewise confirms that its use of the term "departed" does not include deportations. Indeed,

when read in context, it becomes clear that § 106(c) is *not* a statutory back door through which § 106's carefully laid out system of judicial review can be avoided. Rather, it serves the much more modest role of ensuring that judicial review is unavailable to those who willingly comply with deportation orders and depart on their own.

By holding that final orders of deportation are unreviewable after an alien is deported, the First Circuit and other courts effectively have rendered the judicial review process of § 106(a) meaningless. Section 106(a)(1) provides 90 days for an alien to file a petition for review with the court of appeals (30 days for an alien convicted of an aggravated felony), at which point deportation is automatically stayed upon service of the petition on the INS. According to the court of appeals, however, § 106(c) obliquely grants to the INS the unfettered ability to short-circuit this review process altogether. So long as the INS can get to the alien first and ensure that he has "departed" before he gets to the courthouse, the period for review is cut off, whether it has been running a day, a week or a month. As explained by the Ninth Circuit in *Mendez*, the INS would be able "to thwart the jurisdiction of [the courts] where the alien had been 'kidnapped' and removed as easily as it would apply to [a] case involving deportation in derogation of procedural due process." 563 F.2d at 959. What the statute gives with one hand, the INS would be empowered to take away at its whim, thereby subverting the entire purpose and structure of § 106. As Judge Brown explained in *Umanzor*:

> If § [106(c)] "departure" encompassed *all* departures regardless of whether the alien's attorney has been properly notified, the [three-]month grace period to file a petition for review of a deportation order would be rendered meaningless. Congress cannot have intended for such an anomaly to exist in the statutory scheme of § [106].

782 F.2d at 1305 (dissenting opinion) (emphasis in original). Indeed, such a reading of the statute not only is patently untenable and serves no legitimate policy purpose, but violates the "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

In enacting § 106, Congress acted with the expressed desire *not* to impose an "undue limitation" upon the alien's ability to seek judicial review, but instead to allow the alien sufficient time to "ponder[] the propriety of the deportation order against him" and "to determine whether he really has a case upon which he should seek judicial review and to prepare therefor." H.R. Rep. No. 1086, 87th Cong., 1st Sess. (1961), reprinted in 1961 U.S.C.C.A.N. 2950, 2973-74. As explained by then-Deputy Attorney General Byron R. White, "[a]liens seeking review of administrative orders should be given full and fair opportunity to do so * * * [and have] their day in court." *Id.* at 2968.[2]

In any event, as used in the INA, the term "depart" plainly means an absence from the United States *other than by*

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[2] Indeed, the First Circuit's interpretation of § 106(c) would leave aliens with no alternative but to file and serve petitions for review as soon as the Board rules so as to protect their ability to seek judicial review. Inducing such automatic resort to the appellate process hardly serves the basic legislative purpose behind § 106 of "expedit-[ing] the deportation of undesirable aliens by preventing successive dilatory appeals." *Cheng Fan Kwok v. INS*, 392 U.S. 206, 214 (1968). See also Comment, *Deportation and Exclusion: A Continuing Dialogue Between Congress and the Courts*, 71 YALE L.J. 760, 760 & n.4 (1962) (noting that the "explicit goal of the section . . . was to prevent the use of judicial review to delay execution of [deportation and exclusion] orders," a feeling "reflected on virtually every page" of the House Report).

deportation. For example, § 242(f) of the Act, 8 U.S.C. § 1252(f), provides for deportation of an alien who has "unlawfully reentered the United States having previously *departed or been deported* pursuant to an order of deportation" (emphasis added). Accord 8 U.S.C. § 1323(d) (authorizing the Attorney General to prescribe regulations for "the ultimate *departure or removal or deportation*" of alien stowaways) (emphasis added); 8 C.F.R. § 264.1(d) (requiring an alien's registration to be surrendered if he "is naturalized, dies, permanently *departs, or is deported*") (emphasis added). In fact, the term "depart" is used repeatedly throughout the INA to refer to aliens who leave the United States on their own rather than by deportation. See, *e.g.*, 8 U.S.C. § 1254(e); 8 U.S.C. § 1252b(e); 8 U.S.C. § 1184(d); 8 U.S.C. § 1101(g).

That the terms "depart" and "deport" are used disjunctively by Congress throughout the INA itself demonstrates that they carry different meanings within § 106(c). As this Court often has explained, when terms "are each separated by the conjunction 'or' * * * [c]anons of construction indicate that terms connected in the disjunctive in this manner be given separate meanings." *Garcia v. United States*, 469 U.S. 70, 73 (1984) (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)). See also *Brooke Group v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578, 2591 (1993) (same). These different meanings likewise apply to § 106(c) given "the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990). Accord *United States Nat'l Bank v. Independent Ins. Agents of America, Inc.*, 113 S. Ct. 2173, 2185 (1993) (same).

In reaching its decision below, however, the court of appeals relied solely upon the apparent "plain meaning" of the term "depart." Yet, "the meaning of statutory language, plain or not, depends on context" (*King v. St. Vincent's Hospital*, 502

U.S. 215, 221 (1991)), since "the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 113 S. Ct. 1993, 1996 (1993). Indeed, the First Circuit's dictionary construction of § 106(c) is entirely divorced from the statute's context and meaning. For if the term "departed" in § 106(c) necessarily encompasses deportations, Congress' effort to distinguish those terms throughout the text of the INA would be redundant—an outcome that this Court consistently has endeavored to avoid. See, *e.g.*, *Kungys v. United States*, 485 U.S. 759, 778 (1988).

A complete reading of § 106(c) also demonstrates that the statute's purpose is to define those circumstances in which *the alien*, not the INS, can forfeit the right to judicial review. Under § 106(c), judicial review is lost if "*the alien* has not exhausted the administrative remedies available to him * * * or if *he* has departed from the United States after the issuance of the order" (emphasis added). It is only in this fashion that § 106(c) can faithfully be interpreted, particularly given that any other construction would ascribe to Congress the extraordinary and unprecedented purpose of indirectly granting to an agency the unreviewable authority to insulate itself from judicial scrutiny. See *Camacho-Bordes*, 33 F.3d at 28 ("we are reluctant to substitute 'deported' for the statutory term 'departed' when to do so would effectively leave the courts with no way to protect the fundamental due process rights of aliens"); *Marrero*, 990 F.2d at 777 ("[w]e are reluctant to substitute the word 'deported' when a right so fundamental as due process is at stake"). See also, *e.g.*, 3 Gordon & Mailman, IMMIGRATION LAW & PROCEDURE § 81.05[1], at 81-58-60 (1994) (describing alternative view as "questionable"); T. Aleinikoff & D. Martin, IMMIGRATION: PROCESS & POLICY 933-36 (2d ed. 1991) (questioning Fifth Circuit view to the contrary); Comment, *Deportation and Exclusion: A Continuing Dialogue Between Congress and the Courts*, 71 YALE L.J. 760, 789 n.141 (1962)

("[n]otwithstanding the broad language of § [106](c), the courts will probably limit it to cases where the departure was voluntary").

In short, the First Circuit's interpretation of § 106(c) is fundamentally inconsistent with both the meaning of the statute and the structure of § 106, and must for these reasons be rejected.[3] *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374, 2384 (1992); *Eli Lilly & Co. v. Medtronic, Inc.*, 496 U.S. 661, 668-69 (1990); *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 59 (1987). Not only does the court's ruling vitiate the statute's scheme of judicial review, but it grants to the INS the limitless ability to divest the federal courts of the ability to scrutinize its action and to remedy constitution violations. In *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947), this Court warned that "[r]espect for the law does not thrive on captious interpretations," and rejected a reading of the INA similar to that now embraced by the court of appeals. This Court held that to construe an arrival in the United States following an *involuntary* departure as an "entry" under the INA was "too irrational to square with the statutory scheme" since the alien could never have intended to depart in the first place. In this case, it is likewise apparent that Congress did not intend to characterize those who have been involuntary deported as having "departed" under § 106(c) and thereby waived the right to judicial review.

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[3] The First Circuit's ruling also cannot be squared with the "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action," *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991), a presumption that plainly would be offended by interpreting § 106(c) to subvert the thrust of § 106 and vest in the INS the unilateral power to prevent judicial review of its actions in such an oblique fashion.

III. AS INTERPRETED BY THE COURT OF APPEALS, § 106(C) RAISES SERIOUS CONSTITUTIONAL QUESTIONS THAT REQUIRE SUPREME COURT REVIEW

The First Circuit's holding that § 106(c) absolutely bars judicial review even to consider colorable due process claims also must be rejected because such a construction would render the statute unconstitutional—an outcome that must be avoided if at all possible. Indeed, on several occasions this Court has refused to preclude judicial review of administrative action "to avoid 'the serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. 592, 603 (1988) (citing *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)). See also *Johnson v. Robison*, 415 U.S. 361, 366-67 (1974) (same); R. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 372 n.347 (1993) (noting the Court's willingness to use "every resource of statutory construction" to avoid such constructions).[4]

In its decision below, however, the court of appeals concluded that "the strict construction that the language of the statute demands passes constitutional muster," and that there exists "no constitutional infirmity in the outright denial of appellate review following an alien's deportation." App., *infra*, 12a n.7. The court based this conclusion upon the principle that Congress has not invested the federal courts with all the

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[4] See also generally *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 465-66 (1989); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Lynch v. Overholser*, 369 U.S. 705, 711 (1962) ("statute should be interpreted, if fairly possible, in such a way as to free it from not insubstantial constitutional doubts").

jurisdiction that it was authorized to bestow under Article III of the Constitution. *Id.* (citing *Ankenbrandt v. Richards*, 112 S. Ct. 2206, 2212 (1992)). In fact, however, the constitutionality of § 106(c) as interpreted by the court of appeals has nothing to do with whether the jurisdiction of the federal courts extends to the limits of Article III. Rather, it involves "profound and long-debated questions about the power of Congress, consistent with Article III, to preclude all judicial review of executive agency action." *Marozsan v. United States*, 852 F.2d 1469, 1479 (7th Cir. 1988) (en banc).[5]

Courts and commentators alike have acknowledged the "confusion" and "disarray" that exists as to the constitutional necessity of judicial review over action by the executive branch.[6] No modern court, however, has gone so far as to

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[5] These constitutional concerns are especially apparent in cases such as this where Congress *does* choose to allocate judicial power, but invests it in a non-Article III body without adequate assurance of oversight by an Article III court. See H. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 16 (1983) ("[t]here is, in principle, a clear difference between excluding the article III courts entirely from a case and restricting their law-declaring competence once 'judicial power' is, in fact, brought to bear on a controversy").

[6] Fallon, 93 COLUM. L. REV. at 309. See also D. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291, 299, 304 (1990) (arguing that Article III and the Due Process Clause have independent significance as guarantors of judicial review, and noting that the current debate "leaves open large questions about the necessity and scope of judicial review"); A. Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 451 (1989) (noting this uncertainty even though "[t]he Supreme Court has grappled with this question on no fewer than four occasions in the 1980s"); P. Bator,

suggest, as has the court of appeals below, that Congress may altogether preclude judicial review—of any scope, for all claims, factual, legal or constitutional—of coercive agency action. In fact, this Court's decisions strongly suggest to the contrary. See *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 n.23 (1982) (plurality opinion). For where such agency action is involved, surely "the constitutional requirement of due process is a requirement of judicial process." *Crowell v. Benson*, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting). Accord, *e.g.*, *Marozsan*, 852 F.2d at 1479 (holding that statute foreclosing judicial review of Veterans' Administration actions could not preclude judicial review over constitutional claims since "the federal judiciary's responsibility to review constitutional challenges would be hollow indeed if federal executive agencies, immune from judicial review, could circumvent the Constitution at will"); *Ralpho v. Bell*, 569 F.2d 607, 620 (D.C. Cir. 1977) ("if legislation by Congress purporting to prevent judicial scrutiny of the constitutionality of its own actions is itself constitutionally suspect, legislation that frees an administrative agency from judicial scrutiny of its adherence to the dictates of the Constitution must pose grave constitutional questions as well").

Although tribunals like the Board in this case exercise a quasi-judicial function, it is clear that Article III imposes limits on Congress' ability to immunize such bodies from oversight by Article III courts. See R. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 950-74 (1988) ("the rule of law requires that a administrative determinations of legal rights be open to review and thus to correction by the courts"); Amar, 56 U. CHI. L. REV. at 451 n.43 (agency adjudications "must generally be reviewable by

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The Constitution as Architecture: Legislative and Administrative Courts Under Article III, 65 IND. L.J. 233, 269 (1990).

Article III tribunals to guarantee conformity with federal law, as expounded by the Article III judiciary"); G. Young, *Public Rights and the Federal Judicial Power: From Murray's Lessee Through Crowell to Schor*, 35 BUFF. L. REV. 765, 768 (1986). And while it may be that immigration disputes involve so-called "public rights" — rights governing relationships "between the government and others" (see *Northern Pipeline*, 458 U.S. at 69), this Court never has endorsed the view "that Article III has no force simply because a dispute is between the Government and an individual." *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 586 (1985). As this Court explained in *Northern Pipeline*, 458 U.S. at 69 n.23 (emphasis added):

> even with respect to matters that arguably fall within the scope of the "public rights" doctrine, the presumption is in favor of Art. III courts. * * * *Moreover, when Congress assigns these matters to administrative agencies, or to legislative courts, it has generally provided, and we have suggested that it may be required to provide, for Art. III judicial review.*

In cases such as this, the need for Article III judicial review is especially compelling since the agency action involved is coercive in nature and is being attacked as unconstitutional and legally unauthorized. The separation-of-powers values embodied in Article III and its related concerns of individual fairness thus are fully implicated. See Fallon, 101 HARV. L. REV. at 950-52, 961-62, 975-89; H.M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1384 (1953) (requirement of judicial review should be triggered when coercive agency order is involved). See also *Union Carbide*, 473 U.S. at 591 (availability of judicial enforcement of agency determinations is relevant to Article III review requirements).

For decades this Court has recognized that deportation proceedings involve "issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950). For this reason, the Court has stressed that "[m]eticulous care must be exercised lest the procedure by which [an alien] is deprived of that liberty not meet the essential standards of fairness." *Bridges v. Wixon*, 326 U.S. 135, 154 (1945). As read by the court of appeals, however, § 106(c) gives the INS the unilateral ability to take away all of these procedural safeguards. Such a reading cannot be squared with this Court's Article III jurisprudence.

In addition to Article III's requirements, the Due Process Clause of the Fifth Amendment also prevents Congress from completely shutting off judicial review in deportation proceedings. Indeed, in *Ng Fung Ho v. White*, 259 U.S. 276 (1922), this Court unanimously held, applying the Due Process Clause, that because deportation "obviously deprives [an alien] of liberty * * * [and] may result also in loss of both property and life, or of all that makes life worth living," and because of "the difference in security of judicial over administrative action," the executive may not deport an alien making a colorable claim of citizenship without affording him an opportunity for a judicial determination of his claim. *Id.* at 285. Since *Ng Fung Ho*, the Court has continued to stress that the Constitution requires that "judicial intervention in deportation cases" be meaningfully available. See *Heikkila v. Barber*, 345 U.S. 229, 235 (1953).[7]

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[7] See also, *e.g.*, *Superintendent v. Hill*, 472 U.S. 445, 449 (1985) (noting that decisions of this Court "suggest that due process might require some form of judicial review of administrative decisions that threaten constitutionally protected liberty or property interests"); *Estep v. United States*, 327 U.S. 114, 120 (1946) ("[j]udicial review [of agency action] may indeed be required by the Constitution")

Admittedly, "[t]he extent to which legislatures may commit to an administrative body the unreviewable authority to make determinations implicating fundamental rights is a difficult question of constitutional law." *Superintendent v. Hill*, 472 U.S. 445, 450 (1985). However, the court of appeals' holding that Congress could constitutionally insulate the INS from judicial scrutiny even in the face of colorable due process violations explicitly calls for resolution of the fundamental question of the extent to which Article III and the Due Process Clause require judicial review. Presently, this Court's decisions

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(citing *Ng Fung Ho*); *Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("[c]onstitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions"). *Cf. St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring) ("[t]he supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law applied and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality"). Accord Fallon, 93 COLUM. L. REV. at 313 ("it is widely held that there is a constitutional right to judicial review of every alleged violation of a constitutional right") (citing R. Pierce, Jr., ADMINISTRATIVE LAW AND PROCESS § 5.2, at 118 (2d ed. 1992) (concluding that "[d]espite the dearth of case law on the issue, dicta in several cases and scholarly analysis suggest strongly that there is a constitutional right to judicial review of constitutional issues raised by agency action"); B. Schwartz, ADMINISTRATIVE LAW § 8.6, at 482-83 (3d ed. 1991) (same)); Hart, 66 HARV. L. REV. at 1390 ("the courts [have] a responsibility to see that statutory authority was not transgressed, that a reasonable procedure was used in exercising the authority, and -- seemingly also -- that human beings were not unreasonably subjected, even by direction of Congress, to an uncontrolled official discretion").

do not provide a definitive answer to this question, and the courts of appeals have been unable to reach a consensus on their own. As noted by Professor Fallon, "[t]he Supreme Court has failed to speak unequivocally about questions of entitlement to judicial review." 93 COLUM. L. REV. at 333. Accord 5 K. Davis, ADMINISTRATIVE LAW TREATISE § 28:3, at 264 (2d ed. 1984) ("[w]hether a statute that bars judicial review of a substantial constitutional issue would be constitutional has no clear answer in present law. * * * [t]he lower courts have reacted variously to the question"); G. Young, *Public Rights and the Federal Judicial Power: From Murray's Lessee Through Crowell To Schor*, 35 BUFF. L. REV. 765, 869 (1986).

For all of these reasons, and because of the certainty that these constitutional questions will recur given their far-reaching implications for all forms of judicial review of agency action, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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March 1995

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1224

LUCAS P. BAEZ,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Entered Dec. 6, 1994.

Before SELYA, CYR and STAHL, Circuit Judges.

SELYA, Circuit Judge.

Petitioner Lucas P. Baez, also known as Lucas Porfirio Baez-Soto, also known as Domingo Guzman, an alien who was deported following a state narcotics conviction, attempts to challenge the refusal of the Board of Immigration Appeals (BIA or Board) to reopen its decision to deny him a waiver of deportability. Petitioner's case requires this court to make its initial interpretation of the jurisdictional bar contained in the departure clause of section 106(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1105a(c)(1988).[1] The

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[1] The statute provides in material part that "[a]n order of deportation ... shall not be reviewed by any court if the alien ... has (continued...)

courts of appeals have divided on whether this statute signifies what it appears to say. We conclude that the statute's plain meaning must prevail, and, therefore, an alien's departure from the United States, whether voluntary or involuntary, deprives the federal courts of jurisdiction to entertain challenges to an antecedent order of deportation. Because the instant petition solicits judicial inquiry into the correctness of the deportation order that brought about petitioner's departure, we dismiss it for want of appellate jurisdiction.

I. BACKGROUND

Petitioner is a native and citizen of the Dominican Republic. He lawfully entered the United States as a child in 1972. In 1986, he was convicted in a Massachusetts state court of distributing cocaine, and received a five-to-ten-year incarcerative sentence. An alien's commission of a serious drug offense invites deportation. See 8 U.S.C. § 1251(a)(11)(1988); see also 8 U.S.C.A. § 1251(a)(2)(B)(i) (West Supp. 1994) (current version). Adhering to the statutory scheme, the Immigration and Naturalization Service (INS) issued an order asking petitioner to show cause why he should not be deported.

Following petitioner's release from prison in 1988, an immigration judge (IJ) held a hearing on the show-cause order. Under section 212(c) of the Act, 8 U.S.C. § 1182(c), a lawfully admitted resident alien domiciled in this country for no fewer than seven years who has been convicted of a drug offense may secure relief from deportation on the basis of that conviction if the Attorney General determines that a waiver appears to be in the national interest because social and humane considerations

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[1](...continued)
departed from the United States after the issuance of the order." 8 U.S.C. § 1105a(c)(1988).

outweigh the adverse factors evidencing the alien's undesirability.[2] See *Gouveia v. INS*, 980 F.2d 814, 816-19 (1st Cir. 1992) (elucidating balancing test); *Matter of Marin*, 16 I. & N.Dec. 581 (BIA 1978) (similar). During the hearing, petitioner conceded deportability, invoked section 212(c), and requested a discretionary waiver. On June 16, 1989, the IJ issued a decision favorable to petitioner. The judge noted adverse factors, including petitioner's cocaine conviction and neglect of his children, but found those factors overbalanced by petitioner's extended residence, family ties, and the like.

The INS appealed the IJ's decision to the BIA. Under the briefing order applicable to its appeal, the INS had until August 23, 1990, to file its brief, but the matter apparently fell between the cracks. On August 28, petitioner filed a motion to dismiss the appeal with the IJ. The INS responded by serving the wayward brief the next day and, shortly thereafter, submitting its formal opposition to the dismissal motion. In early September, petitioner, apparently realizing belatedly that his motion should have been filed with the BIA rather than the IJ, refiled it with the BIA. After an unexplained three-year lull, the BIA issued an order on September 30, 1993, in which it reversed the IJ's decision, denied petitioner's request for a waiver, and ordered him deported.

On November 22, 1993, at 11:15 p.m., Paul F. Murphy, counsel of record for the petitioner, received a telephone call from petitioner's sister informing him that the INS had taken

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[2] The Attorney General has duly delegated this power to her subordinates within the INS apparatus, with the proviso that applications "for the exercise of discretion under section 212(c) of the Act shall be submitted ... to: (1) the [appropriate regional] director...; or (2) the Office of the Immigration Judge...." 8 C.F.R. § 212.3(a)(1994).

petitioner into custody that day and intended to deport him posthaste. Attorney Murphy claims that, as of that moment, he did not know of the Board's September 30 decision. The next day, the lawyer moved to stay deportation and reopen the proceedings. He filed these motions at the IJ's chambers in Boston. Early that afternoon, the motions were forwarded to the BIA's office in Falls Church, Virginia. At 2:00 p.m., Attorney Murphy telephoned the BIA and supplied an oral statement in order to facilitate immediate review of the motion to stay deportation. At 4:30 p.m., the BIA notified Attorney Murphy that it had denied the stay because the single member who considered the matter found that the motion to reopen had little likelihood of success.[3]

The INS deported petitioner on November 24, 1993. On December 13, in pursuance of the applicable regulation, 8 C.F.R. § 3.2 (1994), the BIA effectively denied petitioner's motion to reopen, deeming it to be withdrawn by virtue of his deportation. On March 10, 1994, petitioner sought judicial review of the "denial" of his motion to reopen. See 8 U.S.C.A. § 1105a (West 1970 & Supp. 1994) (prescribing the procedure for review of final deportation orders in the courts of appeals); see also *Giova v. Rosenberg*, 379 U.S. 18, 18, 85 S. Ct. 156, 156, 13 L.Ed.2d 90 (1964) (per curiam) (holding that the BIA's denial of a motion to reopen a deportation proceeding

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[3] Petitioner did not seek judicial review of the BIA's order within the time then allotted by statute, see 8 U.S.C.A. § 1105a(a)(1) (West Supp. 1994) (providing that petitions for judicial review of such orders must be filed within 90 days); see also *infra* note 4, despite the fact that the time for doing so had not yet expired. By the same token, petitioner did not seek a stay from this court.

is a judicially reviewable final order). The petition appears to have been filed within the time span fixed by statute.[4]

II. THE PROFFERS ON APPEAL

An INS regulation provides in pertinent part that "[t]he decision of the [BIA] shall be in writing ... and a copy shall be served upon the alien or party affected as provided in part 292 of this chapter." 8 C.F.R. § 3.1(f) (1994). The cross-referenced regulation stipulates that service may be effected by mail upon "the attorney or representative of record, or the person himself if unrepresented." 8 C.F.R. § 292.5(a) (1994). At all times material hereto, Murphy was petitioner's attorney of record. He claims not to have received timeous notice of the

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[4] In 1990, Congress amended 8 U.S.C. § 1105a(a)(1) to reduce to 30 days the period within which an alien convicted of certain aggravated felonies on or after November 18, 1988 might petition or judicial review. See Immigration Act of 1990, Pub.L. No. 101-649 § 502(a), 104 Stat. 4978 (1990). Because petitioner's conviction occurred in 1986, he had 90 days, rather than 30, within which to file his petition in this court, see *id.* at § 545(b)(1). INS nevertheless argues that, because the petition to review was not filed within 90 days of the date of the deportation order (September 30, 1993), this court lacks jurisdiction to review that decision. INS's view is problematic. Compare *Fleary v. INS*, 950 F.2d 711, 713 (11th Cir. 1992) (reaching opposite conclusion after considering 1990 amendments to the Act) and *Fuentes v. INS*, 746 F.2d 94, 97 (1st Cir. 1984) (similar; considering earlier version of the Act) with *Stone v. INS*, 13 F.3d 934, 936-39 (6th Cir. 1994) (*contra*; considering 1990 amendments) and *Nocon v. INS*, 789 F.2d 1028, 1032-33 (3d Cir. 1986) (same; considering earlier version of the Act). We need not probe this point, for even if INS is correct in its view—a matter on which we do not pass—it has not argued that the petition for review is untimely as to the Board's jettisoning of the motion to reopen.

BIA's September 30 decision. Desiring to shed light on this factual issue, we authorized the parties to submit fact-specific proffers anent the notification issue. See *Bemis v. United States*, 30 F.3d 220, 222 & n. 2 (1st Cir. 1994) (authorizing factual proffers on appeal).

Petitioner submitted an affidavit signed by Attorney Murphy's secretary, Montsie Moreno, stating that she sorted the lawyer's mail during October of 1993, but did not receive a copy of the BIA's decision in that time frame. For its part, the INS submitted two sworn declarations. The declaration of April M. Verner, supervisory case management analyst of the BIA's Docket Unit, certified, based on her knowledge of BIA procedure and the record of the case, that a copy of the BIA's September 30, 1993 decision had been mailed contemporaneously to Attorney Murphy at 6 Faneuil Hall Marketplace, Boston, MA 02109 (which was counsel's address of record as indicated on BIA Form EOIR-27, dated September 7, 1990).

The second declaration dovetails with Verner's statement but goes on to strike a somewhat different chord. In it, Judith E. Arnott, the Boston-based INS officer who made the arrangements for petitioner's deportation, observed that a copy of Form I-294 (the official notice of the country to which a particular individual's deportation is directed) had been mailed to Attorney Murphy at his address of record shortly after petitioner's deportation, and that the mailing was returned to the INS on December 7, 1993, marked "forwarding time expired." Ms. Arnott added that neither petitioner nor his representative, Attorney Murphy, ever requested the district director to stay petitioner's deportation.

The parties filed no further proffers. At oral argument, however, Attorney Murphy advised that he continued to maintain an office at 6 Faneuil Hall Marketplace and implied

that he had never arranged to have mail forwarded from that address. Nevertheless, he conceded that, in the fall of 1993, his principal offices were located elsewhere, and the Faneuil Hall office was checked for mail at infrequent intervals (perhaps twice a week).

III. ISSUES PRESENTED

Petitioner contends that several errors infected the process leading to his deportation. First, he asseverates that the INS's failure punctually to file its brief deprived the BIA of jurisdiction to hear the initial appeal, and, consequently, that the IJ's decision upholding petitioner's entitlement to a section 212(c) waiver became final agency action (or, put another way, that the BIA's reversal of the IJ's ruling had no force or effect because the BIA's jurisdiction had been pretermitted). Second, petitioner asseverates that, in violation of applicable statutory and administrative rules, the BIA did not properly notify his counsel of its September 30 decision and, therefore, deported petitioner without requisite notice. See, *e.g.*, 8 C.F.R. § 243.3(b) (1994) (providing that a deportation order "shall be executed no sooner than 72 hours after service of the decision").

We are powerless to reach the merits of these asseverations, however, for petitioner's deportation deprives this court of subject matter jurisdiction over the request for judicial review.

IV. ANALYSIS

Section 106(c) of the Act, 8 U.S.C. § 1105a(c), quoted supra note 1, is absolute on its face. It stipulates that a deportation order "shall not be reviewed by any court" once the alien has departed. This flat rule is couched in obligatory terms that reflect Congress's determination to eliminate repetitive and unjustified appeals. See H.R.Rep. No. 1086, 87th Cong., 1st Sess. (1961), reprinted in 1961 U.S.C.C.A.N. 2950, 2971-72.

Despite the unambiguous language of the statute, some courts, presumably troubled by its rigidity, have read exceptions into it, thereby softening its impact and authorizing post-deportation judicial review under certain circumstances. The Ninth Circuit pioneered this view in *Mendez v. INS*, 563 F.2d 956 (9th Cir. 1977). There, an alien who had been deported without notice to his counsel, on the basis of a sentence that had been vacated prior to deportation, pressed forward with a petition for judicial review of the deportation order. The court entertained the petition and ordered the alien readmitted to the United States. See *id.* at 959. In reaching this result, the court read section 1105a(c) as a conditional, rather than an absolute, bar, opining that "'departure' in the context of 8 U.S.C. § 1105a cannot mean 'departure in contravention of procedural due process.'" *Id.* at 958. On this basis, the court held that "'departure' means 'legally executed' departure when effected by the government." *Id.*

Since the first seed was sown, the *Mendez* exception has mushroomed in the Ninth Circuit. Today, that court allows judicial review of deported aliens' claims in an array of situations. See, *e.g.*, *Zepeda-Melendez v. INS*, 741 F.2d 285, 287-88 (9th Cir. 1984) (entertaining petition on claim that deportation occurred without notice to counsel); *Thorsteinsson v. INS*, 724 F.2d 1365, 1367-68 (9th Cir.) (indicating that court would entertain petition on claim that deportation occurred through ineffective assistance of counsel), cert. denied, 467 U.S. 1205, 104 S. Ct. 2386, 81 L.Ed.2d 345 (1984); *Estrada-Rosales v. INS*, 645 F.2d 819, 820-21 (9th Cir. 1981) (entertaining petition on claim that deportation was based on invalid conviction).

Mendez has not fared as well outside its birthplace. To the limited extent that the decision has evoked admiration, its admirers have doused it with faint praise. A decade ago, the Sixth Circuit referred to the *Mendez* exception in approbatory

terms, but did not squarely adopt it, see *Juarez v. INS*, 732 F.2d 58, 59-60 (6th Cir. 1984) (citing *Mendez* in connection with a discussion of an alien's administrative remedies), and to our knowledge has not revisited the question. More recently, a diluted version of the *Mendez* exception has been afforded safe passage in two other courts of appeals. See *Camacho-Bordes v. INS*, 33 F.3d 26, 27-28 (8th Cir. 1994) (hypothesizing that judicial review should be permitted, notwithstanding execution of a deportation order, if a "colorable" claim of a due process violation emerges); *Marrero v. INS*, 990 F.2d 772, 777 (3d Cir. 1993) (same).

At least three other circuits have given *Mendez* a distinctly unfavorable reception. In *Umanzor v. Lambert*, 782 F.2d 1299 (5th Cir. 1986), the Fifth Circuit professed "serious reservations" about the *Mendez* court's holding, and noted that it had become a "sinkhole that has swallowed the rule of § 1105a(c)." *Id.* at 1303 & n. 5. The Fifth Circuit expressly rejected *Mendez* in a subsequent case, explaining that section 1105a(c) was written in plain language that brooked no exceptions to the jurisdictional bar. See *Quezada v. INS*, 898 F.2d 474, 476-77 (5th Cir. 1990). The Tenth Circuit also adopted a strict interpretation of section 1105a(c), ruling that the statute's "unequivocal" language does not permit a *Mendez*-type exception to flourish. *Saadi v. INS*, 912 F.2d 428, 428 (10th Cir. 1990) (per curiam). The Second Circuit recently joined the lengthening anti-*Mendez* parade. See *Roldan v. Racette*, 984 F.2d 85, 90 (2d Cir. 1993) (observing that "[t]he pertinent language of § 1105a(c) constitutes a clear jurisdictional bar, and admits of no exceptions"). Still another court of appeals has signalled that it is skeptical of *Mendez*. See *Joehar v. INS*, 957 F.2d 887, 890 (D.C. Cir. 1992)

(declining to consider the *Mendez* exception in respect to an alien who had departed voluntarily).[5]

We reject the *Mendez* exception. Although *Mendez* itself presented a compelling case on its peculiar facts and the desire to afford relief is understandable on that plane, we believe the court's willingness to take liberties with the language of section 1105a(c) is mischievous and has produced bad law.[6] This straining, dubious at the time, has been rendered all the more suspect by recent Supreme Court opinions emphasizing the importance of a statute's text and plain meaning. See, *e.g.*, *Estate of Cowart v. Nicklos Drilling Co.*, ___ U.S. ___, ___, 112 S. Ct. 2589, 2594-95, 120 L.Ed.2d 379 (1992); *West Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-99, 111 S. Ct. 1138, 1146-47, 113 L.Ed.2d 68 (1991); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241, 109 S. Ct. 1026, 1030, 103 L.Ed.2d 290 (1989); see generally David L. Shapiro,

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[5] In *United States v. Mendoza-Lopez*, 481 U.S. 828, 107 S. Ct. 2148, 95 L.Ed.2d 772 (1987), the Supreme Court held that due process requires that collateral review of a deportation order be available in a subsequent criminal prosecution for unlawful reentry when substantial defects in the underlying administrative proceedings foreclosed direct judicial review. *Id.* at 838, 107 S. Ct. at 2155. In dissent, Justice Scalia suggested that the majority's opinion necessarily betokened a rejection of the *Mendez* holding. See *id.* at 849, 107 S. Ct. at 2161 (Scalia, J., dissenting). But Justice Marshall, writing for the majority, took pains to "express no view" on *Mendez*. *Id.* at 837 n. 13, 107 S. Ct. at 2154 n. 13. Thus, we take the majority's disclaimer at face value and treat the question as an open one.

[6] One is reminded of Lord Campbell's admonition that "it is the duty of all courts of justice to take care, for the general good of the community, that hard cases do not make bad law." *East India Co. v. Paul*, 7 Moo. 85, 111 (P.C.1849).

Continuity and Change in Statutory Interpretation, 67 N.Y.U. L. REV.. 921, 921 & n. 2 (1992) (noting judicial efforts to narrow interpretation to coincide with the statutory text and citing recent examples). To embellish section 1105a(c) as *Mendez* suggests is to import ambiguity into words that are as unambiguous as ordinary linguistic usage permits. That approach is unacceptable, for it mutes the clarion call that Congress has sounded, and, in the bargain, muffles the Court's string of recent "plain meaning" cases.

We think that the proper approach to construing section 1105a(c) is to begin with the text of the statute and grant its words their ordinary meanings. See *Ardestani v. INS*, 502 U.S. 129, ___, 112 S. Ct. 515, 519, 116 L.Ed.2d 496 (1991); *Heno v. FDIC*, 20 F.3d 1204, 1207 (1st Cir. 1994); *United States v. Charles George Trucking Co.*, 823 F.2d 685, 688 (1st Cir. 1987). Beginning in this way brings our inquiry swiftly to a close, for the plain language of the statute prohibits judicial review of a deportation order once the order has been executed. There is certainly no slack in the command that the order "shall not be reviewed by any court." Having set out this command, the statute contains no mention that it is subject to any exceptions. And contrary to the *Mendez* court's view, 563 F.2d at 958, we do not believe that there is any principled way to interpret the word "departed" as failing to encompass the most relevant type of departures--involuntary departures by way of deportation. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 604 (1986) (defining "depart" to include "to go forth or away: set forth: LEAVE").

When Congress plainly marks a path, courts are seldom free to leave it and roam at will in the surrounding veldt. Section 1105a(c) falls within this general rule. Having found a clear meaning in the unvarnished language of the statute, we are duty bound to honor that meaning, not to alter it by applying a judicial gloss.

Of course, there are exceptions to this rule, such as when statutory language, though unambiguous, leads to results that are absurd or are diametrically opposed to the drafters' discernible intentions. See *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 575, 102 S. Ct. 3245, 3250, 3252, 73 L.Ed.2d 973 (1982); *Rubin v. United States*, 449 U.S. 424, 430, 101 S. Ct. 698, 701-02, 66 L.Ed.2d 633 (1981). But the terrain on which this statute rests is inhospitable to the cultivation of such an exception because the statute, read literally, yields a sensible result. On the whole, a literal reading helps promote Congress's intention to eliminate excessive appeals and lend finality to the deportation process. A judge-made exception to section 1105a(c)'s jurisdictional bar, even one limited to "colorable" due process claims--whatever that term may eventually come to mean--can too easily expand to engulf the general rule prohibiting review, see *Umanzor*, 782 F.2d at 1303 n. 5, and thereby thwart achievement of the congressional goal. We think it is elementary that a construction which emasculates a statute is not eagerly to be embraced.[7]

Nor can petitioner's professions of good faith make a significant difference. Although there is no evidence that Baez is seeking to abuse the appellate process, his individual circumstances are insufficient to protect him from the plain

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[7] Moreover, the strict construction that the language of the statute demands passes constitutional muster. Congress has broad discretion to restrict access to the lower federal courts. See *Ankenbrandt v. Richards*, ___ U.S. ___, ___, 112 S. Ct. 2206, 2212, 119 L.Ed.2d 468 (1992) (listing cases). Hence, we perceive no constitutional infirmity in the outright denial of appellate review following an alien's deportation. See *Roldan*, 984 F.2d at 90-91 (upholding constitutionality of § 1105a(c) as jurisdictional bar to habeas corpus); *Umanzor*, 782 F.2d at 1304 (same).

language of the statute. As we have noted before, "[t]hat the reasons for Congress's decision to adopt a particular rule may not be present in an individual case ... is no justification for failing to give effect to the rule in that case." *In re Plaza de Diego Shopping Ctr., Inc.*, 911 F.2d 820, 832 n. 20 (1st Cir. 1990).

We add an eschatocol of sorts. Even if we were to acknowledge that some extreme situations, such as a knowingly unlawful deportation by the INS for the specific purpose of shortstopping an alien's right to review, might justify an exception to section 1105a(c)'s jurisdictional bar, petitioner's claims are not of this stripe. His case hinges on a pair of grievances. Insofar as it depends on INS's deviation from the briefing schedule, it is baseless; the BIA has wide discretion in administering compliance with briefing orders and determining the consequences of a late submission. See, *e.g.*, *Getachew v. INS*, 25 F.3d 841, 845 (9th Cir. 1994) (finding no error in BIA's discretionary decision to accept untimely brief from INS); see also 8 C.F.R. § 3.1(d)(1) (1994) (providing that "the Board shall exercise such discretion and authority ... as is appropriate and necessary for the disposition of the case"). Here, INS's six-day delay seems fribbling, and the BIA's decision not to vitiate the appeal on that ground strikes us as both reasonable and lawful.

Similarly, petitioner's other grievance does not indicate the need for heroic measures. The likely explanation of Attorney Murphy's failure to receive his copy of the BIA decision does not implicate purposeful scheming by the INS, but suggests the accidental misdelivery of properly addressed mail by the postal service--a vagary that plagues us all. And despite the late notification, Attorney Murphy still had time to present a motion for a stay of deportation to a member of the BIA. Once that motion was denied, he had open, but chose not to pursue, several other remedial avenues, including asking the district

director or a court for a stay of the deportation order. Under the circumstances, we do not think that petitioner has alleged the type of extreme unfairness that might warrant overriding the plain language of the statute.

V. CONCLUSION

We need go no further. We join those of our sister circuits that have followed the plain language of section 1105a(c) and found its jurisdictional bar to be absolute. Reading the statute in that manner, the petitioner's involuntary departure from the United States deprives us of jurisdiction to examine the correctness of either the underlying deportation order or the Board's disposition of the motion to reopen. Accordingly, the petition for judicial review is

Dismissed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 94-1224

LUCAS P. BAEZ,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

ORDER OF COURT

Entered July 25, 1994

Respondent has moved to dismiss the instant petition for review, contending that petitioner's intervening departure from the country deprives this court of jurisdiction. See 8 U.S.C. § 1105a(c). Petitioner argues in response that this court retains jurisdiction because of various procedural irregularities attending his deportation.

The courts have split on the question of whether § 1105a(c)'s jurisdictional bar is subject to a due process exception. See, *e.g.*, *Marrero v. INS*, 990 F.2d 772, 776-77 (3d Cir. 1993) (discussing cases); *Roldan v. Racette*, 984 F.2d 85, 89-90 (2d Cir. 1993) (same). Petitioner has addressed this issue in only cursory fashion; respondent has not done so at all. In turn, the two factors relied on by petitioner in this regard--the allegedly defective service of the Board's September 30, 1993 decision, and the alleged failure to notify counsel of petitioner's impending deportation--have not been adequately

developed on the present record. The circumstances surrounding service of the Board's decision have yet to be fully documented. And the parties have not addressed the issue of whether counsel's eleventh-hour notice of the scheduled deportation might trigger a possible exception to § 1105a(c)--a matter of some dispute. Compare, *e.g.*, *Zepeda-Melendez v. INS*, 741 F.2d 285, 288-89 (9th Cir. 1984) with, *e.g.*, *Umanzor v. Lambert*, 782 F.2d 1299, 1303-04 (5th Cir. 1986); see generally 3 C. Gordon & S. Mailman, *Immigration Law and Procedure* § 72.08[2][b], at 72-266 to 267 (1994).

The motion to dismiss is accordingly deferred to the panel scheduled to hear oral argument. The parties are directed to address the foregoing issues (along with any others they wish to raise) in their briefing. They may also submit, by affidavit or otherwise, any additional factual proffers they deem appropriate in support of their respective contentions. See, *e.g.*, *Bemis v. United States*, ___ F.3d ___, No. 93-2387, slip op. at 4 n.2 (1st Cir. 1994) (agreeing to consider proffers on appeal).

By the Court:

Clerk.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A30 889 704 - Boston

In re: LUCAS PORFIRIO BAEZ-SOTO a.k.a. Lucas P. Baez a.k.a. Domingo Guzman

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Paul F. Murphy, Esquire
28 Beacon Street
Chelsea, Massachusetts 02150

ON BEHALF OF SERVICE: Frank J. Crowley, Jr.
General Attorney

CHARGE:

Order: Sec. 241(a)(11), I&N Act [8 U.S.C. § 1251(a)(11)] - Convicted of controlled substance violation

APPLICATION: Motion to reopen

ORDER:

PER CURIAM. The Immigration and Naturalization Service has advised the Board that the respondent was deported from the United States on November 24, 1993. Accordingly, the matter before the Board is withdrawn by operation of law. See 8 C.F.R. § 3.2 (1993).

IT IS ORDERED that the record be returned to the Office of the Immigration Judge without further action.

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A30 889 704 - Boston Date: November 23, 1993

In re: LUCAS PORFIRIO *BAEZ*-SOTO

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Paul F. Murphy, Esquire
28 Beacon Street
Chelsea, MA 02150

APPLICATION: Stay of deportation

Counsel for the respondent has applied for a stay of deportation pending consideration by the Board of a motion to reopen. After consideration of all information, the Board has concluded that there is little likelihood that the motion will be granted. Accordingly, the request for a stay of deportation will be denied.

ORDER: The request for stay of deportation is denied.

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A30 889 704 - Boston Date: Sep. 30 1993

In re: LUCAS PORFIRIO BAEZ-SOTO a.k.a. Lucas P. Baez a.k.a Domingo Guzman

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Paul F. Murphy, Esquire
6 Faneuil Hall Marketplace
Boston, Massachusetts 02109

ON BEHALF OF SERVICE: Patricia M. B. Sheppard
General Attorney

CHARGE:

Order: Sec. 241(a)(11), I&N Act [8 U.S.C. § 1251(a)(11)] - Convicted of controlled substance violation

APPLICATION: Waiver of inadmissibility pursuant to § 212(c) of the Act; 8 U.S.C. § 1182(c)

This matter comes before us by way of the appeal of the Immigration and Naturalization Service from the decision of the immigration judge dated June 16, 1989, finding the respondent deportable as charged but granting the respondent's application for relief under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). The Service has appealed. For the reasons outlined below, the decision of the immigration judge will be reversed and the respondent ordered deported to the Dominican Republic.

The respondent is a 33-year-old, unmarried, native and citizen of the Dominican Republic, who entered the United States as a lawful permanent resident on April 20, 1972. On March 5, 1987, the Immigration and Naturalization Service issued an Order to Show Cause charging him with deportability under section 241(a)(11) of the Act, 8 U.S.C. § 1251(a)(11), as an alien convicted of a crime involving a controlled substance. The order alleged, inter alia, that the respondent was convicted on May 21, 1986, in the Worcester County Superior Court, Massachusetts, for unlawful distribution of a controlled substance (cocaine), in violation of chapter 94C, Section 32A of the Massachusetts General Laws. The respondent was sentenced to a term of incarceration of 5 to 10 years, and released on October 19, 1988.

At his deportation hearing, the respondent, through counsel, conceded service of the Order to Show Cause and the truth of the allegations therein. The immigration judge found the respondent deportable under section 241(a)(11) of the Act; this finding has not been challenged on appeal. We find that deportability has been established by clear, unequivocal, and convincing evidence, as required by *Woodby v. INS*, 385 U.S. 276 (1966), and 8 C.F.R. § 242.14(a). See also *Matter of Barrett*, Interim Decision 3131 (BIA 1990). The issue on appeal is limited to whether relief from deportation is warranted under section 212(c) of the Act in the exercise of discretion.

Section 212(c) of the Act provides that aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of 7 consecutive years, may be admitted in the discretion of the Attorney General without regard to certain specified grounds for

exclusion enumerated in section 212(a) of the Act.[1] The grounds specified provide for the exclusion of aliens who, like the respondent, have been convicted of crimes involving controlled substances and are excludable under section 212(a)(11) of the Act.[2]

However, mere eligibility for a section 212(c) waiver does not automatically entitle the alien to such relief. Instead, the Attorney General, or her delegate, is required to determine, as a matter of discretion, whether a respondent merits the relief sought. The alien bears the burden of demonstrating that he warrants favorable consideration. *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978).

The exercise of discretion in a particular case necessarily requires consideration of all the facts and circumstances involved. There must be a balancing of the adverse factors evidencing the alien's undesirability as a permanent resident against the social and humane considerations presented in his favor. This Board has enunciated several such factors to be considered in determining whether a respondent warrants

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[1] The respondent is eligible for the relief of waiver of inadmissibility under 212(c) even though he is in deportation proceedings and has not left or attempted to reenter the United States because he is a lawful permanent resident who has maintained a lawful unrelinquished domicile of more than 7 consecutive years. *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976); *Matter of Gordon*, 17 I&N Dec. 389 (BIA 1980); *Matter of Silva*, 16 I&N Dec. 26 (BIA 1976). Accord, *Tapia-Acuna v. INS*, 640 F.2d 223 (9th Cir. 1981).

[2] Although not applicable to the instant case, the grounds for exclusion and deportation were revised and redesignated by sections 601 and 602 of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5067 and 5077 (1990). See *Matter of Papazyan*, Interim Decision 3186 (BIA 1992).

section 212(c) relief. Among the factors deemed favorable to respondent are the presence of family ties within the United States, residence of long duration in this country, evidence of hardship to the alien and his family if deportation occurs, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to an alien's good moral character. *Matter of Marin*, *supra*, at 584-85.

Adverse factors include the nature and underlying circumstances of the deportation ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country. *Matter of Marin*, *supra*, at 584. As the negative factors grow more serious, it becomes incumbent upon the respondent to present additional offsetting favorable evidence in his behalf to show he warrants a favorable exercise of discretion. A respondent who has been convicted of a serious offense, such as an offense involving controlled substances, must demonstrate "unusual or outstanding" countervailing equities before a favorable exercise of discretion will be considered. *Id.* at 586.

The nature of the adverse factor or factors (*e.g.*, particularly serious criminal misconduct, or convictions involving controlled substances) may ultimately be determinative of whether section 212(c) relief is granted. Absent unusual or outstanding equities, relief will not be granted in the exercise of discretion in cases where there are particularly adverse factors present. However, the existence of such equities does not create a right to have the consequences resulting from serious criminal misconduct waived. Nor do such equities compel a grant of discretionary relief. *Matter of*

Cerna, Interim Decision 3161 (BIA 1991); *Matter of Edwards*, Interim Decision 3134 (BIA 1990); *Matter of Marin*, *supra*; see *Matter of Roberts*, Interim Decision 3148 (BIA 1991); *Matter of Wadrid*, 19 I&N Dec. 182 (BIA 1984); *Matter of Khalik*, 17 I&N Dec. 518 (BIA 1980); see also *Matter of Carrasco*, 16 I&N Dec. 195 (BIA 1977), aff'd on other grounds, *Carrasco-Favela v. INS*, 563 F.2d 1220 (5th Cir.).

With regard to the issue of rehabilitation, aliens who have recently committed criminal acts have a more difficult task in demonstrating rehabilitation and hence in showing that discretion should be exercised in their favor, but this does not preclude us from considering rehabilitation as a significant discretionary factor. See *Matter of Roberts*, *supra*; *Matter of Gordon*, 17 I&N Dec. 389 (BIA 1980); *Matter of Marin*, *supra*; see also *Matter of Garcia-Reyes*, 19 I&N Dec. 830 (BIA 1988); *Matter of Carrasco*, *supra*. While a section 212(c) waiver applicant who has a criminal record may be required to make a showing of rehabilitation before relief will be granted as a matter of discretion, a clear showing of reformation is not an absolute prerequisite to a favorable exercise of discretion in every case involving an alien with a criminal record. Rather, section 212(c) applications involving convicted aliens must be evaluated on a case-by-case basis, with rehabilitation a factor to be considered in the exercise of discretion. *Matter of Edwards*, *supra*; see *Matter of Roberts*, *supra*.

In the matter presently before us, the record contains evidence of a number of very serious adverse factors. We note initially, the conviction which forms the basis of deportability; the respondent's 1986 conviction for trafficking in cocaine.

Furthermore, the record reveals that the respondent was the subject of a complaint in 1984 alleging failure to pay child support for his two children born to a woman with whom he lived for approximately seven to eight years. The respondent

admitted that he failed to pay adequate child support, that the children and their mother received public assistance, including those periods of time when the respondent resided with them. Court documents indicate that the respondent has had his wages garnished in amounts to cover both arrearages and current support.

The record also reveals that the respondent has a prior arrest in 1984 charging him with possession of cocaine with intent to distribute. The criminal complaint was amended on May 17, 1984, to simple possession of a controlled substance, and the respondent was charged with a violation of Massachusetts General Laws 94C section 34 - unlawful possession of particular controlled substances. The respondent admitted to sufficient facts to warrant a finding of possession of a controlled substance; the respondent paid 300 dollars in court costs, and the case was continued to May 6, 1985. The charges were then dismissed. The service contends that, regardless of the ultimate dismissal of the charges, the respondent admitted sufficient facts to constitute a conviction for immigration purposes pursuant to the standards outlined by the Board in *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988). In contrast, the respondent argues that the 1984 arrest and subsequent dismissal of the charges does not constitute a conviction for immigration purposes.

The immigration judge ruled that the Massachusetts state law under which the respondent was charged was equivalent in scope to the Federal First Offender Statute, and therefore, the dismissal of the charges without imposition of a penalty does not constitute a conviction for immigration purposes.

However, the issue of whether the respondent's 1984 arrest and subsequent dismissal of the charges is a conviction for immigration purposes is peripheral to the ultimate decision in this case. We need not decide the matter presently before us on

the basis of this issue. The respondent's 1986 conviction for trafficking in cocaine and his failure to pay child support are adverse factors of sufficient gravity to compel the requisite showing of counterbalancing unusual or outstanding equities. *Matter of Marin, supra*; *Matter of Buscemi, supra*. We find, upon our de novo review of the evidence of record, that the respondent's length of residence in this country for 21 years is an outstanding equity, but, it is, standing alone, insufficient to overcome the respondent's extremely serious criminal misconduct, therefore his request for a waiver of inadmissibility must be denied in the exercise of discretion.

We find merit to the Service's contention that the very serious nature of the respondent's criminal history compels a denial of relief from deportation in the exercise of discretion. In that regard, the record of proceedings in this case reveals that the respondent admitted to both selling and using cocaine from 1984 through his arrest in 1986. The respondent estimated to selling cocaine 15 to 20 times, at approximately 1,000 dollars per sale, in the six month period leading to his arrest.

In contrast to the adverse factors enumerated above, positive factors of record include the respondent's long residence in this country, and his continued financial support for his children. The respondent also testified that he periodically visits his children during the week or on weekends. The respondent provide financial support to another woman and her children with whom he began living subsequent to his release from prison. The respondent has been steadily employed by Hogan Tire Center since January 1987. His employment commenced as part of a work release program in prison. The respondent donates his time counseling persons with substance abuse problems. The respondent's parents have been lawful permanent residents since 1968.

The respondent's social worker, employer, brother, ex-girlfriend, and counselor testified on behalf of the respondent's application for a waiver of inadmissibility. They testified that he has been rehabilitated, that he enjoys a close, emotionally, supportive relationship with his family and children, that he is an honest and competent employee, and that he has been drug-free since his release from prison. In support of the grant of a waiver of deportability, the respondent contends on appeal that the immigration judge's decision was proper.

The respondent's sole outstanding equity is his length of residence in the United States. Nonetheless, this equity is outweighed by the extremely serious nature of the respondent's criminal history. We disagree with the relative weight assigned to the positive and adverse factors by the immigration judge in this case. The respondent has a history of criminal behavior involving controlled substances and is a convicted trafficker in cocaine. We cannot overemphasize the amount of crime and suffering precipitated by the use, purchase, and sale of illegal drugs in this country. The respondent's first involvement in the criminal justice system resulted from his failure to pay child support. This incident should have served as sufficient warning to the respondent that any subsequent violations of the law would jeopardize his continued presence in this country. Nonetheless, with monumental contempt for the criminal laws of this country, the respondent, by his own admission, repeatedly bought and sold cocaine. We cannot agree with the immigration judge that the respondent's extended residence, family ties, attestations of good moral character and integrity, and subsequent hardship to his family, is outweighed by the extremely serious nature of the respondent's criminal history.

The respondent does not merit relief from deportation in the exercise of discretion. *Matter of Edwards*, *supra*; *Matter of Marin*, *supra*. We recognize that the respondent's deportation

may cause emotional hardship to him and his family; however, the responsibility for this rests with the respondent himself.

Accordingly, the following order will be entered.

ORDER: The decision of the immigration judge is reversed, and the respondent is ordered deported to the Dominican Republic.

FURTHER ORDER: The respondent's motion to dismiss the Service brief as untimely filed is denied.

FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A30 889 704 - Boston Date: Sep. 30 1993

In re: LUCAS PORFIRIO *BAEZ*-SOTO

DISSENTING OPINION: Mary Maguire Dunne, Board Member

I respectfully dissent.

The immigration judge carefully and fully weighed and balanced the adverse factors in this case against the favorable factors and found that the respondent had established that he should be granted discretionary relief from deportation. Without pointing to a single factual or legal error on the part of the immigration judge in reaching his decision, the majority simply substituted its judgment for his.

The sole factor that the majority seems to focus on is the nature of the conviction, a narcotics offense. Indeed, the majority's strong language about the use, purchase and sale of illegal drugs -- while true -- seems to be the basis for its decision. Quite simply, however, Congress has not seen fit to deny Section 212(c) discretionary relief to drug offenders per se. Rather, the entire record must be examined to determining whether or not relief should be granted. The immigration judge did examine the entire record in reaching his decision; the majority looks only at respondent's crime and abrogates its responsibility to balance the adverse and favorable factors. Finding no fault in the immigration judge's analysis, I would dismiss the Service's appeal.

Mary Maguire Dunne
Board Member

U.S. Department of Justice
Executive Office for Immigration Review
Office of the Immigration Judge
Boston, Massachusetts

File No. A 30 889 704 June 16, 1989

In the Matter of	)	
	)	IN DEPORTATION
LUCAS PORFIRIO BAEZ-SOTO	)	PROCEEDINGS
	)	
Respondent	)	

CHARGE: I&N Act, Section 241(a)(11) - [convicted for a violation of a controlled substance].

APPLICATIONS: Waiver of inadmissibility under Section 212(c) of the Immigration and Nationality Act.

ON BEHALF OF RESPONDENT:	ON BEHALF OF SERVICE:
Manny Daskal, Esquire Four Faneuil Market Place Boston, Mass., 02109	Henry Hanley General Attorney Immigration and Naturalization Service J.F.K. Building, Government Center Boston, Mass., 02203

ORAL DECISION OF THE IMMIGRATION JUDGE

Pursuant to Section 242 of the Immigration and Nationality Act, an Order to Show Cause was issued charging respondent to be deportable under Section 241(a)(11) of the Immigration and Nationality Act, in that he was convicted of a violation of the Controlled Substance Act, in that he was convicted on October 14, 1986 for unlawful distribution of a controlled substance to wit cocaine in violation of Chapter 94(C), Section 32(A) of the Mass. General Laws (Exhibit 1).

Respondent, by and through counsel, admitted the truthfulness of the factual allegations, conceded deportability, and designated the Dominican Republic as the country of deportation. Based upon the admissions of counsel and in behalf of respondent, I find respondent is deportable on the charge contained in the Order to Show Cause to the Dominican Republic.

By way of relief from deportation, respondent applied for a waiver of the admissibility of the grounds of excludability under Section 212(a)(c) of the Immigration and Nationality Act.

The respondent, a 28 year old unmarried male, is a native and citizen of the Dominican Republic who was admitted as a lawful permanent resident on April 20, 1972, at New York, New York (Exhibit 4). Respondent has departed the United States approximately four times to visit family members in the Dominican Republic. Respondent's last departure was from November 16, 1985 to December 28, 1985. The duration of the absences were approximately one month.

Respondent's family ties in the United States consists of his parents who came to the United States in 1968. Respondent has two brothers and two sisters who are lawful permanent residents of the United States. Respondent testified he has a close

relationship with siblings and parents. He testified none of his siblings or parents are financially dependent on him for support.

Respondent is a father of two children who were born to Edna Hernandez, Kenia Giselle Baez, who was born on October 16, 1981, and Alvin Baez, who was born on April 9, 1984. Both children were born in Boston, Massachusetts. Respondent testified he has a close relationship with the two children.

Respondent testified that the children have been the recipients of welfare benefits for practically seven to eight years. Respondent also testified he had resided with Edna Hernandez during the period of time she was obtaining support for the children and housing benefits. Respondent testified he is concerned about the welfare of the children and he responds to their needs and provides them with counseling. He sees the children on weekends and times during the week.

Respondent testified he provides financial support to the children when he is financially able to do so and does give them some money. He testified he purchased approximately $300 worth of clothing for the children on or about October 26, 1988. Respondent was incarcerated from the time of his arrest on or about July 23, 1986 until released in October, 1988. He testified the children visited him on a monthly basis.

A complaint was filed on or about March 9, 1984, in District Court, West Roxbury Division in the City of Boston alleging respondent failed to support the child, Kenia from October 16, 1981 to the date of the complaint (Exhibit 14). At a hearing on July 8, 1983, respondent agreed to pay $65.50 a month for support and $34.00 on the arrearage of $1,089.50 effective as of July 15, 1983. Also, a notation contains that respondent made one payment. It also notes that the original complaint cannot be located. Subsequently, on December 29, 1989, a summons was issued for the respondent regarding the non-support of three children of Edna Hernandez. The third

child was listed as Gabriel Hernandez born April 4, 1975. Respondent testified that he attended a hearing on February 7, 1979, before the Child Support Unit along with Edna Hernandez and the representative of the Child Support Unit at which time an agreement was entered that he would pay $100 a week for the support of Kenia and Alvin and $10.00 a week for the arrearage of approximately $5,000 for the medical expenses regarding the birth of the children.

The respondent presented a document consisting of his pay stub reflecting deductions were being made of a total of $110 for child support (Exhibit 15). Respondent testified he's currently up-to-date on the present support payments. Respondent testified that when he appeared in Court on April 7, 1987, for adjudication of paternity, he was relieved of the payment, of the arrearages owed at the time (Exhibit 14).

The respondent testified he began living with Sandra Pena approximately one month before he was arrested in July, 1986. And he resumed that relationship after being released from prison on or about October 19, 1984. He testified he has three children but he's not the father of any of the three children. She resides in a three bedroom rented apartment with a monthly rent of $650. And respondent contributes $300 towards the payment of the rent and other additional funds for groceries. Respondent testified he believes she obtains financial assistance for the children but not any subsidies for the rental expenses.

Respondent testified he attended Brighton High School for approximately one year beginning in 1978 in the 11th grade. He subsequently obtained his general equivalency high school degree while in prison.

Respondent is now employed by the Hogan Tire Center as an alignment man since January 18, 1987. He testified he began his employment on a work release program while in the Halfway House. Respondent testified he's held various

employments in the past in the maintenance and cleaning field. During his period of employment, his average earnings would be approximately $300 to $350 a week. Respondent testified he's never filed Federal income tax returns. Respondent testified he does not suffer from any physical disability.

Respondent then testified he was arrested on or about July 23, 1986 and charged with possession with intent to sale cocaine. Respondent testified he purchased the drugs from a known source and he in turn was selling it to the people in the street. During a period of time he sold narcotics from mid-1985 until the time of his arrest earning approximately $3,200 consisting of approximately 15 to 20 sales with the lowest sale costing $800. Respondent testified he began the use of cocaine in 1984 because he was involved with the wrong crowd. He used it daily as needed approximately one, two times a day consisting of a "couple of lines". The expense to respondent of his habit cost him approximately one-half of his pay check.

Respondent also admitted the arrest in 1984, when he was charged with possession of a controlled substance, Class B, to wit, cocaine with intent to distribute on February 13, 1984, (Exhibit 12). On May 17, 1984, the charge was amended to possession of a controlled substance after admission to sufficient facts and the case was continued to May 16, 1985. Respondent was assessed $300 Court costs which he paid on the same date. On May 16, 1985, the charge was dismissed. Respondent testified he was on probation for two years and then the charge was dismissed.

Respondent testified during his period of incarceration he underwent mandatory drug counseling on a weekly basis with approximately 30 other participants. The group was led by other inmates and from persons outside the institution. Respondent underwent this program for approximately three months. He also underwent other programs involving narcotics

during his incarceration at the various other institutions at which he was incarcerated.

Subsequent to his release, he has been involved with the Peaceful Movement Committee, which is a substance abuse treatment and prevention program (Exhibit 7). The statement from the Peaceful Movement Committee, Inc., notes that respondent accepted the responsibility of his drug habit and has expressed remorse for his prior involvement and that he openly accepted his past mistake. And he has a strong attachment to his family and that it would be a severe loss to his family if he were to be deported. The statement notes that the author's opinion that respondent would not again be involved in his past mistake or take part in any illegal activities.

Respondent testified he is on parole until 1996. He continues to attend Narcotic Anonymous on a weekly basis in this community.

Respondent testified he has a new perspective on life and has seen the errors of his ways of being involved in the sale of drugs. He's undergoing a period of rehabilitation which he feels can only benefit him. He is remorseful of his past behavior. He deeply regrets the separation from his family during the period of his incarceration. He will be devastated if he were to be deported because of his close family ties in the United States.

Respondent testified he underwent a period of culture shock when he came to the United States because of the unfamiliarity of this new life in the United States.

Respondent testified he has been arrested on other occasions for traffic violations. Respondent testified he's involved in community work by volunteering his services and distributing food to the homeless while he was at the halfway house.

Respondent presented his Social Worker from Peaceful Movement who testified in behalf of the respondent. She testified she's been involved in counseling persons with substance abuse problems. She has spoken to respondent over an extended period of time to determine whether or not he would be a recidivist and to learn why respondent would be involved in such activities. She believes it's caused by peer pressure and family pressure. She testified respondent has no problem at the present time, not involved in any present use of drugs by the respondent. Respondent has been cooperative and open and has spoke openly during the sessions. The witness testified the recidivist rate in the general population for persons with the same problems as the respondent is approximately 50 percent. The witness testified she has had no contact with members of respondent's family, but respondent expressed to her his concern for the children and wanted to provide more for the children. She believes that respondent's rehabilitation is sincere and honest on his part.

Respondent's manager from his place of employment testified in behalf of the respondent. He met the respondent in approximately January, 1988, when respondent appeared to answer an ad in the newspaper. He believes respondent is a competent employee who is a dedicated, cooperative and respectful person. He has had no problems with the respondent during his period of employment and considers the respondent to be a nice person.

Respondent presented another witness, Sharon Jones, who helped the respondent during the period of time he was in the Halfway House and under a program in July, 1980 until October, 1988. She testified that she is the Director of the Temporary Housing Program and respondent caused her no concern during the period of time he was there. He was well-behaved and returned promptly on the furloughs granted to him.

Respondent's brother, Hector Baez, testified in behalf of the respondent. He testified he came to the United States in 1972, and all the family ties are in the United States. They are a close family and have a good relationship with each other. The witness testified he and his family members visited respondent on a regular basis while incarcerated. The witness testified he had no knowledge or was aware of any use of cocaine by the respondent. The witness testified respondent treats his family well and is a dependable and helpful person. If he were to be deported, it would cause a separation to the family and the family had never been separated previously.

Edna Hernandez testified as a witness in behalf of the respondent. She testified she has known the respondent for approximately 10 years and lived with him for approximately seven years until 1985. The witness testified she never reported to the Welfare Agency that respondent was residing with her. She never has been married to the respondent. She testified she never brought any action against the respondent for support of the children but the action was brought by the Welfare Agency. The witness testified she has two children by the respondent but a total of three. She testified that the respondent is close to the children and continues to see them. She testified when Alvin had an accident and broke his leg, respondent cared for the child. He sees the children weekly and at times during the week. He purchases items for the children. He does purchase some items for the children but he has never provided any money. She testified the children visited the respondent approximately once or twice a month while he was in prison. She believes that if the respondent were deported, it would have an affect on the children because of their close relationship to him.

The respondent submitted a number of documents in support of his application of respondent's prior employment; his participation at the Haley House that serves homeless men;

character references regarding the respondent should be allowed to remain in the United States as he has paid for his mistake; his high school equivalency certificate and his courses and grades (Exhibit 7). Respondent also attached a statement from his parole board dated November 21, 1988, noting respondent was granted parole and the conditions of release of his current employment and residence; supervision for drugs; and participation in a substance abuse counseling program. The statement also notes the respondent's parole supervision will continue until September 2, 1995.

Section 212(c) of the Act provides in pertinent part, that aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily not under an order of deportation, and who are returning to a lawful unrelinquished domicile for seven consecutive years, may be admitted in the discretion of the Attorney General without regard to certain specified grounds to exclusion enumerated in Section 212(a) of the Act. The grounds specified include an alien who is convicted of a drug offense, as set forth in Section 212(a)(23) of the Act. Section 212(c) of the Act has been interpreted as affording relief from deportation on the basis of such drug offense regardless of whether the respondent in deportation proceedings departed from the United States following the act which had rendered him deportable. *Matter of Silva*, 16 I&N Dec. 26 (BIA 1976). Respondent has established statutory eligibility for relief under Section 212(c) of the Act on the basis on an unrelinquished domicile of over 17 years.

Section 212(c) does not provide an indiscriminate waiver for all who demonstrate statutory eligibility for such relief. Respondent bears the burden to demonstrate his application merits a favorable consideration. *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978).

In determining when a respondent's application for relief under Section 212(c) merits a favorable exercise of discretion, the Immigration Judge must balance the adverse factor evidencing an alien's undesirabilites as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of the application appears in the best interest of this country. *Matter of Marin, supra.*

The adverse factors are respondent's conviction involving cocaine and the neglect of support of his children who were born of wedlock.

Counsel for the respondent has submitted briefs contending that the offense, his offense which was charged on February 13, 1984, possession of a Class B substance, cocaine with intent to distribute, does not constitute a conviction. After respondent's admission to sufficient facts on May 17, 1984, the complaint was amended to read possession of a controlled substance in "Class B". The case was continued to May 16, 1985 and subsequently dismissed on May 16, 1985. Counsel contends that this is not a conviction as set forth under the standard of *Matter of Ozkok*, Int. Dec. 3044 (BIA 1988). In the *Matter of Ozkok, supra*, the Board of Immigration Appeals set forth the elements needed to establish whether or not a conviction exists for Immigration purposes. There must be a finding the alien is guilty or enter a plea of guilty on nolo contendere or has admitted sufficient facts that warrant a finding of guilty; the Judge has ordered some form of punishment, penalty, or restraint on a person's liberty to be imposed, and a judgement or adjudication of guilty may be entered if a person violates the terms of his probation or fails to comply with the requirements of the Court's order, without the availability of further proceedings regarding his guilt or innocence of the original charge.

Counsel for the respondent attached to the supplemental brief the pertinent Massachusetts General Laws, Chapter 94(C), Section 34. It notes that one is not previously convicted of an offense related to drugs after the expiration and under conditions that the Court or probation could have the Court dismiss the proceedings and an order sealing the records relating to the arrest, indictment, conviction, probation, continuance or discharge. Counsel argues in his brief that no punishment by way of probation was ordered by the Court. But the pertinent statute notes one does not violate any conditions of said continuance or the probation. And one must infer that when the Court continues a case, certain conditions are carried along with that continuance. But as to whether or not this constitutes a conviction under the *Ozkok*, *supra*, standard, I would find this is a State First Offender Statute which is comparable to the Federal First Offender Statute. It can only be given one time and for only to those who have had no previous convictions.

It is noted that the respondent's conviction involved the distribution of cocaine. Again, this is a serious offense. Respondent was incarcerated for a substantial period of time. There is no evidence that he has received any disciplinary action or reprimands while incarcerated. He underwent rehabilitation programs regarding narcotics. It is also noted that there has been no evidence presented of any violations of his parole.

Another adverse factor is the respondent's non-support of his two children born out of his relationship with Edna Hernandez. Respondent's testimony is that the prior outstanding arrearages have been discharged so that he is no longer obligated to pay them. The respondent had presented evidence that he is making the payments pursuant to an agreement entered with the State agency overseeing the children. His testimony is that he is current in his payments.

Respondent has a number of family ties in the United States along with his residence in the United States which began when he was approximately 12 years of age. His young adult life into his adult life has been spent here in the United States. Respondent's employment history has been consistent without any substantial periods of unemployment.

His testimony and that of Edna Hernandez and other family members is that respondent has a close relationship with his two children. Prior to the entry of the agreement and respondent's financial support of the children, it does not appear that the children suffered financially. Respondent is now contributing financial support to the children which relieves the State from providing this amount. There would now be a financial and emotional hardship to his two children. Also, there would be an emotional hardship to the respondent's family if he were to be deported. No evidence has been presented that any of respondent's family members are financially dependent on him for support.

Respondent then has presented evidence of his involvement with community affairs during the period of time he was in the Halfway House. He has presented evidence of rehabilitation through various programs and witnesses. He presented a number of letters from family members that respondent should be given an opportunity to demonstrate that he has been rehabilitated and consider him to be a responsible person. He also presented letters from his employment. Respondent expressed remorse for his past criminal behavior. There's no evidence since his release that he's been involved in any other criminal matters.

Based on the favorable factors of extended residence, family ties, the number of letters attesting to the respondent's rehabilitation and no longer involved in any criminal matter,

and a separation that would be caused to his children and family, I'll grant the application as a matter of discretion.

ORDER

IT IS ORDERED that respondent's application for relief under Section 212(c) of the Act insofar as it relates to the conviction as set forth in the Order to Show Cause, is hereby granted.

IT IS FURTHER ORDERED that the proceeding be terminated.

BILLINO W. D'AMBROSIO
Immigration Judge

Article III Of The United States Constitution

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.

Section 106 of the Immigration and Nationality Act,
8 U.S.C. § 1105a

(a) Exclusiveness of procedure. The procedure prescribed by, and all the provisions of chapter 158 of title 28, United States Code, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act, except that --

(1) a petition for review may be filed not later than 90 days after the date of the issuance of the final deportation order, or, in the case of an alien convicted of an aggravated felony, not later than 30 days after the issuance of such order;

(2) Venue; the venue of any petition for review under this section shall be in the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted in whole or in part, or in the judicial circuit wherein is the residence, as defined in this Act, of the petitioner, but not in more than one circuit;

(3) Respondent; service of petition; stay of deportation. The action shall be brought against the Immigration and Naturalization Service, as respondent. Service of the petition to review shall be made upon the Attorney General of the United States and upon the official of the Immigration and Naturalization Service in charge of the Service district in which the office of the clerk of the court is located. The service of the petition for review upon such official of the Service shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs, or unless the alien is convicted of an aggravated felony, in which case the Service shall not

stay the deportation of the alien pending determination of the petition of the court unless the court otherwise directs;

(4) Determination upon administrative record. Except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;

(5) Claim of nationality; determination or transfer to district court for hearing de novo. Whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of title 28, United States Code. Any such petitioner shall not be entitled to have such issue determined under section 360(a) of this Act or otherwise;

(6) Whenever a petitioner seeks review of an order under this section, any review sought with respect to a motion to reopen or reconsider such an order shall be consolidated with the review of the order;

(7) Challenger of validity of deportation order in criminal proceeding; motion for judicial review before trial; hearing de novo on nationality claim; determination of

motion; dismissal of indictment upon invalidity of order; appeal. If the validity of a deportation order has not been judicially determined, its validity may be challenged in a criminal proceeding against the alien for violation of subsection (d) or (e) of section 242 of this Act only by separate motion for judicial review before trial. Such motion shall be determined by the court without a jury and before the trial of the general issue. Whenever a claim to United States nationality is made in such motion, and in the opinion of the court, a genuine issue of material fact as to the alien's nationality is presented, the court shall accord him a hearing de novo on the nationality claim and determine that issue as if proceedings had been initiated under the provision of section 2201 of title 28, United States Code. Any such alien shall not be entitled to have such issue determined under section 360(a) of this Act or otherwise. If no such hearing de novo as to nationality is conducted, the determination shall be made solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive. If the deportation order is held invalid, the court shall dismiss the indictment and the United States shall have the right to appeal to the court of appeals within thirty days. The procedure on such appeals shall be as provided in the Federal rules of criminal procedure. No petition for review under this section may be filed by any alien during the pendency of a criminal proceeding against such alien for violation of subsection (d) or (e) of section 242 of this Act;

(8) Deferment of deportation; compliance of alien with other provisions of law; detention or taking into custody of alien. Nothing in this section shall be construed to require the Attorney General to defer deportation of an alien after

the issuance of a deportation order because of the right of judicial review of the order granted by this section, or to relieve any alien from compliance with subsections (d) and (e) of section 242 of this Act. Nothing contained in this section shall be construed to preclude the Attorney General from detaining or continuing to detain an alien or from taking him into custody pursuant to subsection (c) of section 242 of this Act at any time after the issuance of a deportation order;

(9) Typewritten record and briefs. It shall not be necessary to print the record or any part thereof, or the briefs, and the court shall review the proceedings on a typewritten record and on typewritten briefs; and

(10) Habeas corpus. Any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

(b) Limitation of certain aliens to habeas corpus proceedings. Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made heretofore or hereafter under the provisions of section 236 of this Act or comparable provisions of any prior Act may obtain judicial review of such order by habeas corpus proceedings and not otherwise.

(c) Exhaustion of administrative remedies or departure form United States; disclosure of prior judicial proceedings. An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. Every petition for review of for habeas corpus shall state whether the validity of the order has been upheld in any prior judicial proceeding, and, if so, the nature and date thereof, and the court in which such proceeding

took place. No petition for review of for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceedings, unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order.

(2)

No. 94-1462

Supreme Court, U.S.
FILED
JUN 2 1995
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

LUCAS P. BAEZ, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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18 pp

QUESTION PRESENTED

Whether the court of appeals correctly held that Section 106(c) of the Immigration and Nationality Act, 8 U.S.C. 1105a(c), deprived it of jurisdiction to consider petitioner's challenge to an executed order of deportation.

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LUCAS P. BAEZ, PETITIONER

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IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 41 F.3d 19. The opinions of the Board of Immigration Appeals (Pet. App. 17a-28a) are unreported, as is the decision of the immigration judge (Pet. App. 29a-41a).

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1994. The petition for a writ of certiorari was filed on March 3, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of the Dominican Republic who was admitted to the United States as a lawful permanent resident in 1972, at the age of 12. Pet. App. 2a, 20a. In 1986, petitioner was convicted by a Massachusetts court of distributing cocaine and was imprisoned. *Id.* at 2a. The Immigration and Naturalization Service (INS) then instituted deportation proceedings against petitioner, charging him with deportability under Section 241(a)(11) of the Immigration and Nationality Act (Act), 8 U.S.C. 1251(a)(11) (1988), as an alien convicted of a controlled substance offense. Pet. App. 2a.[1]

Petitioner, who was represented by counsel, conceded his deportability but applied for discretionary relief from deportation under Section 212(c) of the Act, 8 U.S.C. 1182(c) (1988 & Supp. V 1993).[2] An

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[1] Section 241(a) of the Act was amended by the Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, § 602(a), 104 Stat. 5077. The revisions, which recodified Section 241(a)(11) of the Act as Section 241(a)(2)(B)(i), 8 U.S.C. 1251(a)(2)(B)(i) (Supp. V 1993), apply only to deportation proceedings for which notice was given on or after March 1, 1991, and thus do not apply to petitioner. See IMMACT § 602(d), 104 Stat. 5082. The former version of Section 241(a)(11), 8 U.S.C. 1251(a)(11) (1988), provided for the deportation of any alien "convicted of a violation of, or a conspiracy to violate, any law or regulation of a State, the United States, or a foreign country relating to a controlled substance."

[2] Section 212(c) authorizes the Attorney General to waive certain grounds for exclusion of permanent resident aliens who have journeyed abroad and who seek to "retur[n] to a lawful unrelinquished domicile of seven consecutive years." 8 U.S.C. 1182(c) (1988 & Supp. V 1993). Although Section 212(c) by its terms applies only to exclusion proceedings, the same discretionary waiver provisions have been held to be available in

immigration judge granted petitioner's request for relief. Pet. App. 29a-41a. The INS appealed that decision to the Board of Immigration Appeals (Board or BIA). In a decision issued on September 30, 1993, the Board, with one member dissenting, reversed the decision of the immigration judge and denied petitioner's request for discretionary relief from deportation, citing the serious adverse factors presented, including petitioner's criminal background. *Id.* at 19a-28a. The BIA also denied petitioner's motion to dismiss the INS's appeal, which contended that the INS's brief was untimely filed. *Id.* at 27a; see Admin. Rec. 27.

The INS took petitioner into custody on November 22, 1993, almost two months after the issuance of the BIA's decision. That evening, petitioner's family contacted his attorney, Paul Murphy, who claims not to have known of the BIA's decision until that time. The next day, Murphy filed a combined motion to reopen the deportation proceedings and to stay the order of deportation. The motion to reopen renewed petitioner's argument that the INS's brief to the BIA had been untimely filed. See Admin. Rec. 10.

The BIA denied the stay a few hours later, in an order signed by the Board member who had dissented from the decision rejecting petitioner's request for Section 212(c) relief.[3] The order stated that, "[a]fter

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deportation proceedings against resident aliens who meet the seven-year domicile requirement. See, *e.g.*, *Francis* v. *INS*, 532 F.2d 268 (2d Cir. 1976); *In re Silva*, 16 I. & N. Dec. 26, 30 (B.I.A. 1976).

[3] Although the version of that order reprinted in the petition appendix is not signed, the order contained in the certified administrative record is signed by Board member Dunne. Admin. Rec. 9.

consideration of all information, the Board has concluded that there is little likelihood that the motion [to reopen] will be granted." Pet. App. 18a. Petitioner did not seek a stay from the court of appeals, and he was deported to the Dominican Republic on November 24, 1993. *Id.* at 17a. On December 13, 1993, the BIA further ruled that, because petitioner had been deported, his motion to reopen was "withdrawn by operation of law. See 8 C.F.R. § 3.2 (1993)." Pet. App. 17a.

2. Petitioner filed a petition for review in the court of appeals on March 10, 1994, almost six months after the Board's original decision.[4] The court of appeals held (Pet. App. 1a-14a) that it lacked jurisdiction over the petition due to 8 U.S.C. 1105a(c), which provides that "[a]n order of deportation or of exclusion shall not be reviewed by any court if the alien * * * has

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[4] Because petitioner's attorney maintained that he never received the BIA's order reversing the immigration judge's decision, the court of appeals authorized the parties to submit factual proffers on that issue. Pet. App. 6a. The INS submitted a declaration by the BIA's supervisory case management analyst, who stated that a copy of the BIA's decision was contemporaneously mailed to Murphy at his office address of record, 6 Faneuil Hall Marketplace, Boston. *Ibid.*; see Gov't C.A. Br. Exh. A. The INS also submitted a declaration from an INS deportation officer, who stated that a document concerning petitioner's deportation was sent to the Faneuil Hall address shortly after the deportation, but was returned to the INS marked "forwarding time expired." Pet. App. 6a; Gov't C.A. Br. Exh. B & Attach. 2. At oral argument, Murphy conceded that he had moved his principal office, but he stated that he continued to maintain the Faneuil Hall office and checked that office for mail at "infrequent intervals." Pet. App. 6a-7a. He also "implied that he had never arranged to have mail forwarded from [the Faneuil Hall] address." *Ibid.*

departed from the United States after the issuance of the order." The court rejected petitioner's contention that it could exercise jurisdiction in his case, finding the statute "absolute on its face." Pet. App. 7a. The court also rejected the argument that the word "departed," as used in Section 1105a(c), encompasses only voluntary departures in the face of a deportation order, and not involuntary departures pursuant to a deportation order, observing that deportations are "the most relevant type of departures." *Id.* at 11a.

The court acknowledged that some other courts of appeals, "presumably troubled by [the] rigidity [of the statute], have read exceptions into it." Pet. App. 8a. It noted, for example, that, in a series of cases beginning with *Mendez* v. *INS*, 563 F.2d 956 (1977), the Ninth Circuit has "read section 1105a(c) as a conditional, rather than an absolute, bar, opining that '"departure" in the context of 8 U.S.C. § 1105a cannot mean "departure in contravention of procedural due process."'" Pet. App. 8a (quoting *Mendez*, 563 F.2d at 958). But the court observed that, "[s]ince the first seed was sown, the *Mendez* exception has mushroomed in the Ninth Circuit," Pet. App. 8a, and it found more persuasive the decisions of the Second, Fifth, and Tenth Circuits rejecting the Ninth Circuit's reasoning in *Mendez*, see *id.* at 9a (noting that Fifth Circuit has referred to *Mendez* as a "sinkhole that has swallowed the rule"). The court concluded that the *Mendez* "court's willingness to take liberties with the language of section 1105a(c) is mischievous and has produced bad law," and that "[t]o embellish section 1105a(c) as *Mendez* suggests is to import ambiguity into words that are as unambiguous as ordinary linguistic usage permits." *Id.* at 10a, 11a.

The court also added that, even if the statute precluding judicial review of executed deportation orders does contain an implicit exception for extreme situations, petitioner's claims are not so serious as to warrant the invocation of such an exception. Pet. App. 13a. It characterized petitioner's objection to the timeliness of the filing of the INS's brief before the BIA as "baseless." *Ibid.* The court also stated that the circumstances surrounding petitioner's deportation did not demonstrate "the type of extreme unfairness that might warrant overriding the plain language of the statute." *Id.* at 14a. It suggested that Murphy had failed to receive the BIA's order reversing the immigration judge's decision because of accidental misdelivery of properly addressed mail, and it noted that, despite the late notification, Murphy still had time to present a stay application to the BIA, and could also have sought a stay from the INS district director or the court of appeals. *Id.* at 13a-14a.

ARGUMENT

Petitioner correctly notes (Pet. 8-15) that there is some disagreement among the courts of appeals as to whether an implied exception should be recognized to the language of 8 U.S.C. 1105a(c), which precludes judicial review of a deportation order after the alien has departed from the United States. This case, however, is not an appropriate vehicle for consideration of that issue, for two reasons. First, the court of appeals lacked jurisdiction in this case over the petition for judicial review of the deportation order for the independent reason that the petition was not timely filed. See *Stone* v. *INS*, 115 S. Ct. 1537 (1995). Second, the outcome of this case would not be

different in any circuit that recognizes an exception to the preclusion of judicial review.

1. The Board of Immigration Appeals issued its decision on September 30, 1993, but petitioner did not file a petition for judicial review of that decision in the court of appeals until March 10, 1994. That petition was untimely because, under 8 U.S.C. 1105a(a)(1) (Supp. V 1993), petitioner had only 90 days in which to file a petition for judicial review of the order of deportation.[5]

Petitioner did file a motion with the BIA to reopen the deportation proceedings on November 23, 1993. That motion, however, did not toll the time for filing a petition for review of the deportation order in the court of appeals. "[A] deportation order is final, and reviewable, when issued. Its finality is not affected by the subsequent filing of a motion to reconsider. The order being final when issued, an alien has 90 days from that date to seek review." *Stone*, 115 S. Ct. at 1549.[6] Although, at the time petitioner filed his

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[5] As the court of appeals noted (Pet. App. 5a n.4), aliens convicted of aggravated felonies have substantially less time in which to file petitions for review of deportation orders. Although petitioner's narcotics trafficking offense, if committed today, would be defined as an aggravated felony (see 8 U.S.C. 1101(a)(43) (Supp. V 1993)), the expedited review procedures apply only to aliens whose aggravated felony convictions were entered on or after November 18, 1988. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7347(b), 102 Stat. 4472. Petitioner's conviction was entered on May 21, 1986. Pet. App. 20a.

[6] Petitioner styled his motion as a motion to reopen, but it was, in substance, a motion for reconsideration. Motions to reopen deportation proceedings are limited to situations in which the petitioner brings to the Board's attention "evidence [that] is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. 3.2.

petition for review, a First Circuit decision suggested that motions to reopen might toll the finality of deportation orders (see Pet. App. 5a n.4), that case has been superseded by this Court's decision in *Stone*, a jurisdictional ruling that must be applied to petitioner's case. See *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988).

Thus, the only matter that could have been raised in the court of appeals when the petition for review was filed was the BIA's decision not to reopen the deportation proceedings. When an agency "*refuses* to reopen a proceeding, what is reviewable is merely the lawfulness of the refusal." *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 278 (1987); see *INS* v. *Abudu*, 485 U.S. 94, 104-105 (1988); *INS* v. *Rios-Pineda*, 471 U.S. 444, 449 (1985). And in cases like the present one, where the motion to reopen was based upon nothing more than a contention that the BIA made an error in its original decision, the "order which merely denies rehearing of . . . [the prior] order is not [judicially] reviewable" at all. *Locomotive Engineers*, 482 U.S. at 280.[7]

Petitioner did not allege any new evidence in his motion. In any case, the *Stone* opinion does not suggest that a motion to reopen differs from a motion for reconsideration with respect to the lack of any effect on the finality of the Board's deportation order. See *Stone*, 115 S. Ct. at 1541 (noting that Stone filed a "Motion to Reopen and/or to Reconsider").

[7] Although the Court stated in *Abudu* that the abuse-of-discretion standard applies to motions to reopen "regardless of the underlying basis of the alien's request [for relief]," 485 U.S. at 99 n.3, it was not faced in that case with a motion to reopen that merely reiterated the claims made in the prior proceedings. The motion to reopen in *Abudu* involved allegations of changed circumstances in the government of Ghana after

Even if the BIA's decision to deny petitioner's motion to reopen is judicially reviewable, the standard of review is abuse of discretion. *INS* v. *Doherty*, 502 U.S. 314, 323 (1992); *INS* v. *Abudu*, 485 U.S. at 105. In this case, there is no reasonable argument that the BIA abused its discretion in refusing to reopen the proceedings. The BIA based its refusal to reopen squarely on 8 C.F.R. 3.2, which provides, in relevant part:

> A motion to reopen or a motion to reconsider shall not be made by or in behalf of a person who is the subject of deportation proceedings subsequent to his departure from the United States. Any departure from the United States of a person who is the subject of deportation proceedings occurring after the making of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion.

"There is no statutory provision for reopening of a deportation proceeding, and the authority for such motions derives solely from regulations promulgated by the Attorney General." *Doherty*, 502 U.S. at 322. It was therefore entirely within the agency's discretion to limit the availability of the discretionary remedy of reopening, by means of a regulation that categorically precludes further administrative consideration of orders of deportation entered against

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the immigration judge issued the initial deportation order. *Id.* at 97. In *INS* v. *Doherty*, 502 U.S. 314 (1992), the Court reviewed a denial of a motion to reopen for abuse of discretion, but that case also involved an allegation of changed circumstances—there, the Attorney General's decision to overrule the designation of the alien's country of deportation. *Id.* at 320-321 (opinion of Rehnquist, C.J.).

aliens who have departed from the United States while subject to a deportation order. And, irrespective of the correctness *vel non* of the court of appeals' construction of the *statutory* term "departed" to include departures pursuant to an executed deportation order (see p. 5, *supra*), the agency's interpretation of the term "departure" in its own regulation to include deportations is entitled to "broad deference." *Thomas Jefferson Univ.* v. *Shalala*, 114 S. Ct. 2381, 2387 (1994). But see *Wiedersperg* v. *INS*, 896 F.2d 1179, 1181 (9th Cir. 1990). Because the only issue properly before the court of appeals was whether the BIA correctly construed its own regulation to preclude it from acting on petitioner's motion to reopen, the issue on which petitioner seeks review is not properly presented.

2. This case is not an appropriate vehicle for resolution of the conflict among the courts of appeals for the additional reason that the outcome would not have been different if the case had arisen in one of the circuits that recognizes an implied exception to Section 1105a(c). No circuit has adopted the rule that petitioner champions (Pet. 16), namely, that the term "departed" does not include deportations at all. Even the Ninth Circuit, which has endorsed perhaps the broadest exception to Section 1105a(c), has concluded that an alien who has been deported pursuant to lawful procedures may not obtain judicial review of the deportation order after the deportation. See *Arreaza-Cruz* v. *INS*, 39 F.3d 909 (9th Cir. 1994).

The Ninth Circuit, reasoning that Congress did not intend the INS to avoid judicial review through "its own disregard for the law" (*Mendez*, 563 F.2d at 959), has concluded that "departure" in Section 1105a(c)

means " 'legally executed' departure when effected by the government." *Id.* at 958. Three other circuits have endorsed a somewhat more limited exception and have held that judicial review is available when the record reveals a "colorable due process claim" in the deportation proceedings. See *Camacho-Bordes* v. *INS*, 33 F.3d 26, 28 (8th Cir. 1994); *Marrero* v. *INS*, 990 F.2d 772, 777 (3d Cir. 1993); *Juarez* v. *INS*, 732 F.2d 58, 59-60 (6th Cir. 1984). But even under those decisions, petitioner could not obtain judicial review, because his deportation was legally executed, and he has no colorable claim of a due process violation.

Petitioner contends (Pet. 13) that the INS did not serve his attorney with a copy of the BIA's final order of deportation or provide his attorney with 72 hours' advance notice of the deportation, and thus argues that the INS violated his statutory right to counsel and its own regulations. But the evidence presented to the court of appeals by the INS, which petitioner did not controvert, was that the Board did mail a copy of its final decision to the record address of his attorney, Paul Murphy, in conformity with 8 C.F.R. 292.5(a). See note 4, *supra*; Pet. App. 6a. At oral argument, Murphy admitted that, in the autumn of 1993, his principal offices were located at an address different from the address of record. *Id.* at 6a-7a. While there was conflicting evidence whether Murphy had made efforts to have his mail forwarded, the failure of petitioner's attorney to make adequate arrangements for the forwarding of legal papers concerning his clients cannot be laid at the door of the INS or the BIA as a due process violation. The government took the steps required by its regulations to notify counsel of the final order of deportation issued

against petitioner.[8] Contrary to petitioner's contention (Pet. 13), therefore, this case is unlike both *Mendez* and *Zepeda-Melendez* v. *INS*, 741 F.2d 285 (9th Cir. 1984), for in each of those cases, the BIA and the INS did not attempt to notify the alien's attorney that a final order of deportation had been issued, and the Ninth Circuit therefore ruled that it had jurisdiction over the alien's petition for review because the deportation had not been legally executed. See *Zepeda-Melendez*, 741 F.2d at 288-289; *Mendez*, 563 F.2d at 959.

Furthermore, even during the short period between the time that petitioner was taken into custody and his deportation, petitioner's attorney had an opportunity to seek a stay of the deportation that was sufficient to satisfy procedural due process. During that period, petitioner's attorney filed with the BIA a motion to reopen and a motion to stay the deportation. He could have also sought an emergency stay from the INS District Director (see 8 C.F.R. 243.4), and he could have filed a timely petition for review of the deportation order in the court of appeals and sought a stay from that court.[9]

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[8] Petitioner contends (Pet. 14) that 8 C.F.R. 243.3 requires the INS to give counsel "72 hours notice of his deportation." In fact, the regulation requires only that the INS not deport an alien any sooner than "72 hours *after service*" of the BIA's final order of deportation. 8 C.F.R. 243.3(b) (emphasis added). That regulation does not define "service," but a similar regulation, governing service of written decisions by immigration judges, provides that "[s]ervice by mail is complete upon mailing." 8 C.F.R. 242.19(a).

[9] In general, the filing of a timely petition for judicial review of a deportation order and its service on the INS District Director results in an automatic stay of deportation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1995

See 8 U.S.C. 1105a(a)(3) (Supp. V 1993). However, because petitioner was convicted of a crime that is now defined to be an aggravated felony (see note 5, *supra*), he would not have been entitled to the automatic stay. That is the case even though petitioner's conviction was entered before November 18, 1988. Section 513(a) of IMMACT provides that aliens convicted of aggravated felonies are not entitled to the automatic stay, see 104 Stat. 5052, and the Immigration Technical Corrections Act of 1991 makes that exclusion applicable to aliens whose convictions for aggravated felonies were entered "before, on, or after" the effective date of IMMACT, November 29, 1990. See Pub. L. No. 102-232, Tit. III, § 306(a)(11)(B), 105 Stat. 1751. See generally *Arthurs* v. *INS*, 959 F.2d 142, 143 (9th Cir. 1992).

SUPREME COURT, U.S.
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No. 94-1462

In the Supreme Court of the United States

OCTOBER TERM, 1994

LUCAS P. BAEZ, *Petitioner,*

v.

IMMIGRATION AND NATURALIZATION SERVICE, *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF *AMICI CURIAE* AMERICAN IMMIGRATION LAWYERS ASSOCIATION, LEGAL ACTION CENTER OF THE AMERICAN IMMIGRATION LAW FOUNDATION, MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AND TRAVELERS AND IMMIGRANTS AID IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held, in conflict with rulings of the Third, Sixth, Eighth and Ninth Circuits, that Section 106(c) of the Immigration and Nationality Act precludes judicial review of final orders of deportation after an alien has been deported, even if the deportation was illegally executed and/or violated the alien's rights under the Due Process Clause of the Fifth Amendment to the United States Constitution.

2. If so, whether Congress constitutionally can preclude judicial review of final agency adjudications to consider claims asserting colorable violations of the Due Process Clause of the Fifth Amendment to the United States Constitution.

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Fong Haw Tan v. Phelan, 333 U.S. 6 (1947) 11

Gonzalez-Julio v. INS, 34 F.3d 820 (9th Cir. 1994) 13

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Landon v. Plasencia, 459 U.S. 21 (1982) 12

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Marrero v. INS, 990 F.2d 772 (3d Cir. 1993) 13

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Montilla v. INS, 926 F.2d 162 (2d Cir. 1991) 14

Ng Fung Ho v. White, 259 U.S. 276 (1922) 11

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Rafeedie v. INS, 880 F.2d 506 (D.C. Cir. 1991) 12

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8 U.S.C. § 1105a . . . . . *passim*

Miscellaneous:

T. Alenikoff & D. Martin, *Immigration: Process and Policy* (2d ed. 1991) 19

The Federalist No. 32 (J. Cook ed. 1961) 17

Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984) 14

H.R. Rep. No. 1086, 87th Cong., 1st Sess. (1961), reprinted in 1961 U.S.C.C.A.N. 2950 . . . . . 6, 14, 18

Koh, *Nonacquiescence in Immigration Decisions of the U.S. Courts of Appeals*, 9 YALE L. & POL'Y REV. 430 (1991) 17

Martin, *Mandel, Cheng Fan Kwok, and Other Unappealing Cases: The Next Frontier of Immigration Reform*, 27 VA. INT'L L.J. 803 (1987) 18

Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992) 13

Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633 (1990) 14

Torres, *Gaining Relief Under Section 212(c): Disparate Results Based on Geographic Location*, 8 GEOG. IMMIG. L.J. 253 (1994) 17

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INTERESTS OF THE AMICI CURIAE

Amicus American Immigration Lawyers Association is a national association of lawyers and law school professors who practice and teach in the fields of immigration and nationality law.[1] AILA has as its objectives to advance the administration of law pertaining to immigration, nationality and naturalization, to cultivate the jurisprudence and promote reforms of the immigration laws, and to facilitate the administration of justice and elevate the standard of integrity,

[1] Letters from counsel for the parties, consenting to the submission of this brief, have been filed with the Clerk of the Court.

honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters.

Amicus Legal Action Center of the American Immigration Law Foundation is a non-profit advocacy and litigation program of AILF, an immigration bar foundation. The mission of the AILF Legal Action Center is to represent the public interest in the fair and just administration of immigration and nationality laws and related laws and policies in order to ensure fundamental fairness and due process for immigrants and refugees.

Amicus Mexican American Legal Defense And Educational Fund (MALDEF) is a national nonprofit advocacy organization working to promote the civil rights of Hispanics in the areas of immigration, education, employment and political rights. MALDEF has a direct and substantial interest in the resolution of the questions presented in this case, and in ensuring that deportation proceedings are carried out in a fair and lawful fashion. The ruling of the court of appeals in this case, like those of other courts, represent a serious threat to the civil rights of Hispanics and other immigrant groups who now are faced with the possibility of being deprived of access to judicial review to guard against illegal deportations that are carried out in violation of their civil rights.

Travelers And Immigrants Aid is a 107-year-old not-for-profit social service agency which, among other things, provides legal representation to low-income immigrants through its Midwest Immigrant Rights Center (MIRC). Through its staff of three attorneys and eight Justice Department Accredited Representatives, and a *pro bono* panel of 160 volunteer attorneys, MIRC represents more than 2,000 immigrants a year, including approximately 200 persons a year in deportation proceedings, many of whom are directly affected by the questions presented in this case.

The Petition before this Court raises fundamental questions of great concern to *amici* regarding the rule of law in the immigration field and the preservation of constitutional safeguards to those who are subject to the immigration laws. The questions presented in this case provide a long-awaited opportunity for this Court to resolve the uncertainty over the availability of post-deportation judicial review,

particularly in cases where deportation has been carried out illegally in violation of aliens' rights to counsel and to due process. *Amici* have a direct and serious interest in assisting in the development of this body of law, in eliminating the confusion faced by practitioners and courts who seek to ascertain and apply the pertinent law, and in overcoming the prejudice suffered by both represented and unrepresented non-citizens denied access to judicial review, effective advice of counsel, and due process. *Amici's* familiarity with the administration of justice in the immigration field lead them to believe that this Court would benefit from consideration of their views as to the compelling reasons supporting review in this case.

STATEMENT

The Statue of Liberty is more than a notable sculpture; it symbolizes the promise of America. That promise is reflected in the varying hopes and dreams of the individual immigrants and refugees who come to our shores. A common thread tying together all those aspirations is the shared confidence that principles of fairness and due process prevail in this country. From the time the framers of the Constitution responded to the arbitrariness of unbridled colonial officials by setting up an innovative system of governance, the United States has been guided by the collective judgment that no branch of government should be granted the unreviewable authority to act without the checks and balances that were carefully designed to guard against arbitrary action.

In this case, the decision of the Court of Appeals for the First Circuit raises serious and far-reaching statutory and constitutional questions which challenge the durability of that guarantee. In effect, the court holds that the statutory and constitutional rights of aliens are not subject to the words of Congress or the rulings of the courts, but instead, ultimately are controlled by the Immigration and Naturalization Service which may abrogate those rights without judicial oversight. The First Circuit's opinion is of great concern to immigrants, immigration practitioners and scholars alike because of the confusion it creates as to the meaning of Section 106(c) of the Immigration and Nationality Act ("INA") and the availability of judicial review under the INA. Under its holding in this case, an alien who is involuntarily

deported forever loses the right to challenge the order of deportation in court no matter the merits of the INS' decision, and whether or not that deportation was illegal or in violation of the alien's constitutional rights. That is not, and *cannot*, be the law.

The lack of uniformity among the courts of appeal on this very important question has created problems of legal and human proportion, not only for aliens, many of whom are unrepresented, but for immigration lawyers who must advise immigrants of their rights under the law and ensure that those rights are protected to the fullest measure. The instant decision of the court of appeals also is of great concern because it provides an alien with no recourse whatsoever should the alien be deported in violation of his right to counsel or his constitutional right to due process. Rather than read Section 106 to allow aliens the opportunity provided them by the statute to consider the availability *and advisability* of judicial review, the court of appeals' decision makes clear that the only way to ensure access to judicial review is by winning the race to the courthouse to obtain either the automatic or discretionary stay of deportation that becomes available upon filing of a petition for review (assuming that the alien even made aware of the entry of the final order in a timely fashion in the first place). Such a consequence not only unacceptably and needlessly disregards aliens' rights, but frustrates the government's legitimate interests in law enforcement and timely and lawful removal of aliens subject to final orders of deportation as well.

In short, the questions presented in this case are of vital significance to the daily administration of justice under the immigration laws. As *amici* can readily confirm, the confusion over these issues continues only to grow and worsen. This case provides an ideal opportunity for this Court to resolve these important statutory and constitutional questions, and we urge this Court to grant review.

ARGUMENT

I. REVIEW SHOULD BE GRANTED TO AFFIRM THE STATUTORY AVAILABILITY OF JUDICIAL REVIEW OF A DEPORTATION UNDER SECTION 106 AFTER AN INVOLUNTARY REMOVAL

Section 106 of the INA provides for exclusive review of final deportation orders in the courts of appeals. To obtain such review, an alien is granted 90 days from the issuance of the final order (30 days in the case of an alien convicted of an aggravated felony) to file a petition for review as long as the alien has exhausted his administrative remedies and has not "departed" from the United States. 8 U.S.C. § 1105a(a),(c). The First Circuit's ruling, however, casts into serious doubt the availability of this period for seeking judicial review by granting to the INS the unfettered authority to cut off the alien's right to judicial review by simply carrying out the order—even by clearly illegal and unconstitutional means.

Since the Ninth Circuit's decision in *Mendez v. INS*, 563 F.2d 956 (9th Cir. 1977), the courts have been unable to reach a consensus over the availability of judicial review under Section 106(c). This state of affairs: whether an alien in fact has any time under Section 106(a)(1) to decide whether to pursue judicial review, or whether the process of judicial review is simply a race to the courthouse to secure a stay of deportation under Section 106(a)(3) is unacceptable. *Amici* believe that the First Circuit's opinion in this case is erroneous and contrary to the statute's own terms. The questions presented transcend far beyond the specific merits or confines of this case alone, and warrant specific guidance from the Court.

A. Confusion Over The Meaning And Effect of Section 106(c) Has Resulted In Disparate Access To Judicial Review In Immigration Cases

The judicial review procedures in Section 106 were designed to promote the efficient disposition of deportation orders and a fair opportunity for aliens to challenge them. As then Deputy Attorney General Byron White explained in support of the statute, "[a]liens seeking review of administrative orders should be given full and fair

opportunity to do so." H.R. Rep. No. 1086, 87th Cong., 1st Sess. (1961), reprinted in 1961 U.S.C.C.A.N. 2950, 2968. The House Report emphasized that providing an opportunity for review in the court of appeals would give an alien "greater rights, greater security, and more assurance of a close study of his case by experienced judges." *Id.* at 2972.

This Court has "repeatedly acknowledged 'the strong presumption that Congress intends judicial review of administrative action.'" *Traynor v. Turnage*, 485 U.S. 535, 542 (1988), quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 683 n.12 (1986).[2] This presumption may be rebutted only upon a showing of "clear and convincing evidence." *Reno v. Catholic Social Servs.*, 113 S. Ct. 2485, 2499 (1993). Where the review sought is of a "colorable constitutional claim," the government also bears the burden of making a "heightened showing" of preclusive intent on the part of Congress. *Webster v. Doe*, 486 U.S. 592 (1988). For this reason, apparently, many courts properly have refused to construe Section 106(c) as precluding judicial review of colorable constitutional claims. See Pet. at 9-10, 14-15.

The First Circuit's interpretation of Section 106(c) is tantamount to an outright denial of judicial review for otherwise eligible appellants. Such preclusion of judicial review is clearly at odds with the well-settled presumption favoring such review. *McNary v. Haitian Refugee Center*, 498 U.S. 479, 496 (1991) (interpretation of statutes should be subject to judicial review); *Superintendent v. Hill*, 472 U.S. 445, 449 (1985) (review of agency decisions implicating protected liberty or property interests may be required by the Constitution). By reading Section 106(c) to grant the INS absolute power to thwart an alien's right to judicial review under Section 106(a), the First Circuit and its predecessors have thrown the entire

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[2] This presumption of reviewability is not a creation of the judiciary, but was inscribed by Congress in the Administrative Procedure Act. Sections 701 and 702 of the APA, for example, state that a person aggrieved by agency action is "entitled" to judicial review unless the relevant statute precludes it.

scheme of judicial review under the INA into chaos, making it virtually impossible for those who must apply the statute on a daily basis to do so with any measure of confidence.

In its decision in *Stone v. INS*, 115 S. Ct. 1537 (1995), this Court addressed the consolidation of petitions for review of final orders with those for review of motions under Section 106(a)(6), and in doing so affirmed unequivocally that Congress intended in Section 106 to provide a right of judicial review. In reinforcing the need for preserving judicial review, this Court expressed concern with the interpretation advanced by the petitioner in that case that a motion to reconsider should be treated as having the usual tolling effect on the period for seeking review.[3] Given the unique circumstances of an appellant facing a final order of deportation, seeking agency reconsideration would have created for such an alien a "Hobson's choice": to petition for review of a final deportation order to obtain a stay, or to seek agency reconsideration and face the risk of immediate deportation. 115 S. Ct. at 1546.

Such an untenable "choice" is of course, distinct, but is still similar to the "Hobson's choice" facing aliens who seek to avail themselves of the time period provided by Section 106 for deciding whether or not to appeal—since waiting would likewise expose aliens (under the First Circuit's reading of the statute) to the risk of immediate deportation and the loss of judicial review. Indeed, to interpret Section 106(c) as allowing the INS to frustrate an alien's access to judicial review by deporting him not only departs from traditional rules of construction, but as a practical matter encourages a perhaps unnecessary increase of the federal judicial dockets. For the lucky, the First Circuit's reading of the statute will cause aliens to err on the side of filing a petition for review immediately upon

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[3] In *Stone*, the majority opinion noted without deciding that "[o]nce an alien has been deported, the courts lack jurisdiction to review the deportation order's validity." 115 S. Ct. at 1546. There is no suggestion, however, that this Court intended to decide the question presented in this case. Not only was this issue not briefed by the parties in *Stone*, but a contrary holding in this case would in no way conflict with the decision in *Stone*.

receipt of a final order, purely to avoid that right from being extinguished before a reasoned determination can be made whether to appeal. For the unlucky, the court of appeals' holding is tantamount to issuing INS a license, notwithstanding the alien's right to counsel and due process, to "arrest" with a single apprehension both the alien and his right to judicial review. Such a result would serve no legitimate purpose.

B. The Plain Meaning of Section 106(c) Can Be Resolved By Giving Uniform Effect to The Relevant Terms In The Context of The INA

On its face, Section 106 uses the term "departed", a term of art in immigration law and policy that connotes a knowing and voluntary departure from the United States by the alien. Contrary to the assumption of the court of appeals (Pet. App. 11c), the term "depart" is readily distinguishable from other terms in the statute that reflect an *involuntary* removal from the United States for a foreign or native land, such as "deportation", "expulsion", and "removal".[4]

Courts *always* should avoid construing a statutory provision so as to "completely nullify a procedure so intrinsic a part of the legislative scheme." *Costello v. INS*, 376 U.S. 120, 127-128 (1964). See Pet. at 17-19. In this case, however, it appears that there was no consideration of the statutory scheme at all. Nor does it seem that even a dictionary comparison was made with the word "deport" or "deportation", which would have revealed that term "depart" or "departure" typically refers to an act of volition, or something one

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[4] For example, non-citizens holding certain nonimmigrant statuses under Section 214 routinely depart and re-enter the United States using visas designated for such purposes; they have not been "deported". Others, including lawful permanent resident aliens, depart and return without even being found to have made a *meaningful departure*: they have not been deported. See Section 101(a)(13), which uses the term "departure" and differentiates it explicitly from "deportation". The concept and term is applied with recurring frequency to aliens not yet lawfully admitted but eligible for status under various provisions of the INA. See, e.g., *Castrejon-Garcia v. INS*, 49 F.3d 603 (9th Cir. 1995).

does himself, while "deport" or "deportation" generally is something done *to* the individual by someone else.

The message sent by the court of appeals in this case is that the guarantee of judicial review in Section 106 is either an arbitrary or illusory one, available only to those who can get to the courthouse and serve the INS without getting caught and deported by the INS first.[5] According to the First Circuit, it would be within the power of the INS and not Congress or the courts, to determine whether an alien has access to judicial review simply by arresting and deporting him before he has a chance to seek judicial review or even to consult with counsel. This is neither a rational or permissible interpretation of the language of Section 106(c), nor does it further the intent of Congress.[6] A statutory provision intended to benefit the alien, *i.e.*, by conferring upon him a right to judicial review, should not be construed so as to penalize him.[7] There is no support in the statute either for such an interpretation or its practical impact.

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[5] The "vagaries" of timely service on both the INS and the alien (or his counsel) are significant since INS has the benefit of internal governmental access to decisions of the BIA, while the alien must rely upon that agency's proper and accurate record keeping, as well as the reliability of the United States mail to receive notice of a final order of deportation in time to petition for review. The court of appeals' holding hardly serves to level the playing field. See Pet. at 13-15. Indeed, no amount of rarified vocabulary or gratuitous commentary by the First Circuit concerning the quality of the U.S. Mail (Pet. App. 13a), can contradict the fact that such fundamental procedural guarantees as notice and an opportunity to respond constitute the cornerstone of our understanding of due process in this country. *Plyler v. Doe*, 457 U.S. 202 (1982); *Bridges v. Wixon*, 326 U.S. 135 (1945).

[6] Courts generally are bound to defer to an agency's determination of a term within its statutory meaning, unless the interpretation clearly is contrary to the sense intended by Congress, as is the case here. *Chemical Manufacturers Assn. v. NRDC*, 470 U.S. 116, 125 (1985).

[7] *Castrejon-Garcia, supra* (when more than one definition for a statutory term exists the one which effectuates the intent of Congress is to be given effect).

In *amici's* view, consistent with that of the petitioner, the term "departed" in Section 106(c) reasonably can be read only to preclude judicial review in cases where an alien has actually departed the United States voluntarily (i.e., with a knowing understanding and waiver of the legal consequences) after the issuance of a final deportation order.[8] This reading, as distinct from the more painful construction adopted by the court of appeals below, gives full effect to the distinctions drawn in the INA between "deportations" and "departures". It also is most consistent with the clear purpose of Section 106(c), *i.e.*, to set forth circumstances in which an alien may waive the right to judicial review by failing to comply with the section's timeliness, exhaustion, and non-departure requirements.

By extending the reach of Section 106(c) to involuntary removals, the effect of the court of appeals' decision allows INS unilaterally to shorten the 90-day window for seeking judicial review—*to as little as one day*—and thus forces an alien to involuntarily "waive" his rights. That cannot be the law. This Court has rejected the contention that an alien having no intent to "depart" nonetheless makes an "entry" upon return to the United States causing him, effectively, to waive the protections due him as a permanent resident, *Rosenberg v. Fleuti*, 374 U.S. 449, 462 (1963), just as it has declared it "irrational" to hold that an alien "taken" to a foreign land had left voluntarily. *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947). The First Circuit's holding that an alien's unintended, forced departure waives his or her right to judicial review is similarly irrational.

The interpretation advanced by *amici*, on the other hand, would not necessarily prolong an alien's stay in the United States, as it would allow post-deportation review. Indeed, recent amendments to Section 106(a)(3) provide in some cases for an automatic stay upon

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[8] Of course, such a waiver must be knowing. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974) (waiver of statutory rights must be "voluntary and knowing"). See also, Section 242A(b)(3); Sec. 130004, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, as amended effective September 13, 1994 (waiver of appeal period must be knowing and voluntary).

filing a petition for review and serving the appropriate official, while allowing deportation even during the period of judicial review.[9]

In any event, even if the statute were read to preclude judicial review in cases of involuntary deportations, it is still apparent that the First Circuit's decision cannot be left to stand since INS action which results in deportation without proper and adequate notice to counsel and an opportunity for judicial review before an alien is exiled from his family, business and community is clearly unconstitutional.[10] Indeed, four circuits have properly recognized that whatever the statute's purpose, it cannot be interpreted to preclude judicial review of claims that a deportation has been carried out illegally.

The split in the circuits over the meaning of Section 106(c) and the availability of post-deportation judicial review is intolerable, and has seriously hindered the fair and consistent administration of justice under the immigration laws. *Amici* therefore strongly urge this Court to grant review and resolve this issue once and for all.

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[9] Limitations on access to judicial review for those convicted of an aggravated felony, by narrowing of the length of the appeal period, were imposed by Sec. 7347(b) of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, eff. Nov. 18, 1988, amended by Sec. 501 of the Immigration Act of 1990 (Immact 90). eff. Nov. 29, 1990, Pub. L. No. 101-649, 104 Stat. 4978, applicable (with regard to the appeal period) to final orders of deportation issued on or after January 1, 1991. In terms of lifting the automatic stay upon filing a petition for review, limitations also were imposed by Sec. 513 of Immact 90, applicable to petitions for review filed more than 60 days following the date of enactment (January 28, 1991).

[10] While still classified as civil in nature, deportation has been said by this Court to constitute "the equivalent of punishment" *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1947); "a sentence to a life in exile" *Jordan v. DeGeorge*, 341 U.S. 223 (1951) (J. Jackson dissenting); "an event that results in loss of property or life or all that makes life worthwhile" *Ng Fung Ho v. White*, 259 U.S. 276 (1922). See also *Yepes-Prado v. INS*, 10 F.3d 1363 (9th Cir 1994) (little is more drastic than expelling persons - even those convicted of an aggravated felony - when their family members are residents of this country).

II. THE COURT OF APPEALS' DECISION LEAVES ALIENS WITHOUT ACCESS TO JUDICIAL REVIEW FOR VIOLATIONS OF THEIR CONSTITUTIONAL RIGHTS

Over the past 100 years, this Court often has recognized the rights of aliens under the Fifth Amendment to due process and the assistance of counsel. These rights are cherished indeed, for it is a disturbing reality that those rights are often ignored by the INS in its zeal to "remove" aliens from the United States as quickly as possible. Indeed, *Amici's* membership report that it is not an uncommon occurrence for INS agents to deport aliens without notice to their counsel or regard to due process. The court of appeals' reading of Section 106(c) leaves aliens in such cases without any hope or recourse. If the statute must be read in this fashion, it is clearly cannot pass constitutional muster.

A. Failure To Provide A Judicial Forum For Constitutional Claims Deprives an Alien Of Liberty Without Due Process Of Law

The Fifth Amendment guarantees that persons not be deprived of liberty without due process of law. A permanent resident alien is entitled to that protection. See *Landon v. Plasencia*, 459 U.S. 21, 25-26 (1982) (recognizing greater protections available to permanent residents than to illegal aliens); *Rafeedie v. INS*, 880 F.2d 506 (D.C. Cir. 1991) (ties and obligations "give the permanent resident alien a stake in the United States substantial enough to command the protection of due process"). Indeed, an alien's recognized liberty interest in remaining in the United States is of the highest order, and one which the Constitution protects against erroneous deprivation. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).[11]

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[11] In *Landon*, 459 U.S. at 34, this Court explained that the right to a given procedural safeguard depends on "the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures." See also *Kwong Hai Chew v. Golding*, 344 U.S. 590, 602-03 (1953), cited in *Landon*, 459 U.S.

The right of aliens to counsel and to fundamental fairness in immigration proceedings is not only statutory, but of constitutional magnitude. *Jean v. Nelson*, 727 F.2d 957, 983-84 (en banc) (11th Cir. 1984), aff'd on other grounds, 472 U.S. 846 (1984) (First Amendment and due process right to counsel extends even to excludable aliens who have far fewer due process rights than aliens subject to deportation proceedings). Most courts of appeal thus have readily acknowledged the prejudice that flows from denial of counsel to an alien facing deportation. *Baires v. INS*, 856 F.2d 89, 91 n. 2 (9th Cir. 1988) (right to counsel "fundamental" and not to be treated casually by INS); *Cheung v. INS*, 418 F.2d 460 (D.C. Cir. 1979) (denial of right to obtain counsel inherently prejudicial); *Castenada-Delgado v. INS*, 525 F.2d 1195 (7th Cir. 1975) (denial of continuance to obtain counsel violates due process). Failure to notify and inform counsel has been held to violate due process. *Camacho-Bordes v. INS*, 33 F.3d 26, 28 (8th Cir. 1994); *Marrero v. INS*, 990 F.2d 772, 777 (3d Cir. 1993) (failure to serve attorney violates due process). In addition, an inadequate opportunity to assert appellate rights before the agency violates due process protections guaranteed in deportation proceedings. *Gonzalez-Julio v. INS*, 34 F.3d 820, 925 (9th Cir. 1994) (10 days to file agency appeal unreasonable compared to petitioner's substantial interest and risk of erroneous deprivation).

Even those circuit courts that have rejected *Mendez* have acknowledged the right to counsel in deportation proceedings, thus creating an illogical and unnecessary conflict within their own courts between the right to counsel generally and the potential denial of the right to counsel when it comes to accessing judicial review under Section 106(c). *United States v. Campos-Ascencio*, 822 F.2d 506 (5th Cir. 1987) (denial of counsel violates Fifth Amendment); *Waldron v.*

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at 33 ("Although the holding [in *Chew*] was one of regulatory interpretation, the rationale was one of constitutional law."); *Woodby v. INS*, 385 U.S. 276, 284-85 (1966) (Court addressed its awareness of the drastic deprivations caused when a resident is forced to forsake all his ties to this country and go to a foreign land). See also generally, Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992).

INS, 984 F.2d 71 (2d Cir. 1993) (failure to advise counsel of decision); *Montilla v. INS*, 926 F.2d 162 (2d Cir. 1991) (no intelligent waiver of right when alien not informed).

The court of appeals in this case, however, refused to recognize that a day in court *is* the "process" that is "due" under the Constitution, basing its view on Congress's Article III power to withhold jurisdiction from lower federal courts. Pet. App. 12a n.7. *Amici* respectfully submit that the court of appeals' constitutional analysis is flawed for a number of reasons. First, it ignores the fact that the Due Process Clause of the Fifth Amendment *amended* the original Constitution and thus necessarily limits Article III. See Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633, 1648 (1990). Second, it ignores the teaching of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that whether there is a constitutional right to judicial review is a question for the judiciary—not Congress or the executive branch—to decide. And third, it ignores the hollowness of a constitutional right enforceable only by the same executive agency accused of violating it.

To the contrary, President Eisenhower, who signed the INA into law, told Congress that "Constitutional due process wisely confers upon any alien, whatever the charge, the right to challenge in the courts the Government's finding of deportability." H.R. Rep. No. 1086, 1961 U.S.C.C.A.N. at 2968. Courts and scholars also have long insisted that a total preclusion of judicial review for claims of constitutional rights violations would infringe due process.[12] To hold otherwise would allow INS to issue and execute deportation

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[12] See *e.g.*, Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 921 n.113 (1984) ("all agree that Congress cannot bar all remedies for enforcing federal constitutional rights"); *Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir.) ("while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law"), cert. denied, 335 U.S. 887 (1948).

orders in an arbitrary, discriminatory and unconstitutional fashion before aggrieved aliens have a chance to seek judicial review and to challenge the constitutional validity of such deportations. It is hard to imagine that any court would find such a practice consistent with what Americans mean by due process.[13] Fairness undoubtedly mandates that a governmental agency accused of violating constitutional rights not have the final say as to that claim.

A legal alien, especially one with extensive family ties in this country like Petitioner, has an enormous stake in remaining in the United States, as this Court often has acknowledged. The value of judicial review in safeguarding against overzealous action by INS and the illegal or unconstitutional deportation of an immigrant likewise cannot be questioned. Indeed, the government can have no legitimate interest in precluding judicial review in such cases.

The decision of the court of appeals is of crucial constitutional significance to *all* immigrants to the United States, and seriously jeopardizes the ability of immigrants to protect the core procedural safeguards guaranteed them by the constitution. Although *amici* believe that Section 106 can and should be read in such a way as to avoid these constitutional concerns, the court of appeals' reading of the statute, if left undisturbed, unavoidably calls upon the court to resolve these "significant constitutional questions". *Amici* believe that this case provides an important opportunity to do just that, and urge this Court to grant review.

B. It Is Time For This Court To Resolve This "Serious Constitutional Question"

Whether due process requires judicial review of constitutional claims is a question that has been raised many times by this Court. On each occasion, the Court has suggested that judicial review of such claims may indeed be required by the Due Process Clause, but has avoided having to answer the question by finding nonconstitu-

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[13] Due process means many things, but it "centrally concerns the fundamental fairness of governmental activity." *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

tional grounds for review (an outcome that we favor in this case as well). See, *e.g.*, *Webster v. Doe*, 486 U.S. 592, 603 (1988) (noting "'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim"); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986); *Weinberger v. Salfi*, 422 U.S. 749, 762; *Johnson v. Robison*, 415 U.S. 361, 366 (1974).

It is perhaps remarkable that the Court has never had occasion to confront the constitutional necessity of judicial review in cases of administrative action. Yet, this question has continued to confront - both this Court and the lower courts for over six decades without a consistent answer. See *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 77 (1936) (Brandeis, J., concurring) ("When dealing with constitutional rights * * *, there must be the opportunity of presenting in an appropriate proceeding, at some time, to some court, every question of law raised, whatever the nature of the right invoked or the status of him who claims it"); *Crowell v. Benson*, 285 U.S. 22, 88 n.54 (1932) (Brandeis, J., dissenting). Certainly, one of the primary functions of this Court is to dispel longstanding confusion or doubts on important questions of law, especially those of constitutional dimension. See *Miranda v. Arizona*, 384 U.S. 436, 490 (1966). Given the fundamental liberty interests at stake in this and other cases, this case provide a crucial opportunity to do just that. Indeed, if left to stand, the court of appeals' decision in this case will provide aliens with no forum at all in which to challenge deportations that are carried out in violation of their constitutional rights.

III. THE QUESTIONS PRESENTED HERE RAISE UNRESOLVED LEGAL ISSUES OF CRITICAL PRACTICAL SIGNIFICANCE TO PRACTITIONERS, ALIENS AND THEIR FAMILIES, AND TO THE JUST ADMINISTRATION OF IMMIGRATION POLICY

As matters now stand, an alien such as petitioner who is issued a deportation order and is illegally deported in violation of his right to due process would be entitled to judicial review of that order in the Third, Sixth, Eighth and Ninth Circuits, but not in the First, Second,

Fifth and Tenth Circuits.[14] Such an outcome is not only arbitrary, but contrary to sensible immigration policy.[15] Of particular concern to *amici*, such conflicting rules perpetuate unsanctioned and lawless conduct on the part of the INS, create needless difficulties in advising and representing clients, mandate the filing of potentially ill-advised petitions for review raising ethical questions, and artificially inflate numbers that affect public policy decisions concerning the administration of justice in immigration matters.

On the one hand, the First Circuit's rule generates, immediately upon issuance of a deportation order, a "Hobson's choice". Either the alien must race to the courthouse in an attempt to petition for judicial review before INS can effect a deportation, or he must risk erroneous deprivation of his interests in judicial review, access to

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[14] In the latter circuits, not only is such an individual deprived of review of the agency's underlying order, but he is without a forum in which to challenge the agency's action in illegally deporting him.

[15] Such an outcome also may run afoul of the Constitution, which (in Art. I, § 8) grants Congress the power to "establish an uniform Rule of Naturalization." Certainly, Congress intended Section 106(c) to be construed and applied uniformly, yet aliens who are subject to deportation orders are accorded differing rights pertaining to judicial review due to the split in the circuits. Alexander Hamilton, supporting the uniformity provision, urged that "if each State had power to prescribe a distinct rule, there could be no uniform rule." The Federalist No. 32, at 201 (J. Cook ed. 1961). That same principle mandates uniform judicial rules be applied among the circuit courts. *Cf.* Koh, *Nonacquiescence in Immigration Decisions of the U.S. Courts of Appeals*, 9 YALE L. & POL'Y REV. 430 (1991) ("it is inconceivable that Congress intended that an alien's excludability should depend on the fortuity of the circuit in which he was apprehended or the circuit in which he was given a hearing"); Torres, *Gaining Relief Under Section 212(c): Disparate Results Based on Geographic Location*, 8 GEO. IMMIG. L.J. 253 (1994) (same). See also Judicial Improvement Act of 1990, P.L. 101-650, 104 Stat. 5089 (requesting Federal Judicial Center to report on unresolved conflicts among the courts of appeals and whether they encourage forum shopping, create unfairness to litigants, and encourage nonacquiescence by federal agencies).

counsel, and other incidents of due process. This situation is sure to result in filings without regard to merit (since aliens will have no time to make an informed judgment after consultation with counsel as to whether judicial review is appropriate). It also will impose a needless burden on already overcrowded judicial dockets, while encouraging a disregard of the rule of law by creating an incentive for INS to deport aliens summarily before they can seek judicial review.

On the other hand, by reading the term "depart" in Section 106(c) to include only voluntary departures (and not forced or mandatory deportations), aliens who receive final deportation orders have time to consider whether they have a basis for appeal—just as Congress intended. See H.R. Rep. No. 1086, reprinted in 1961 U.S.C.C.A.N. at 2973-74 (noting that time periods in Section 106(a) were designed to allow the alien sufficient time to "ponder[] the propriety of the deportation order against him" and "to determine whether he really has a case upon which he should seek judicial review and to prepare therefor"). Allowing judicial review to take place without regard to whether the petitioner has been denied a stay and deported can accomplish a reasonable goal consistent with both due process and law enforcement interests.[16]

This is particularly true when one considers the recent amendments to Section 106. It is uniformly accepted that these amendments were enacted as an expression of Congress' intent that criminal aliens not prolong their stays in the United States on account of statutory provisions for judicial review.[17] Notably, Congress did not restrict

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[16] Notably, countries that allow appeals after departure, including Great Britain where aliens who are subject to deportation orders can appeal *only* after they depart, have found that such a rule works smoothly. See Martin, *Mandel, Cheng Fan Kwok, and Other Unappealing Cases: The Next Frontier of Immigration Reform*, 27 VA. INT'L L.J. 803, 816-819 (1987), quoted in T. Alenikoff & D. Martin, *Immigration: Process and Policy* 933 (2d ed. 1991).

[17] There now exist three situations under Section 106(a)(3) in which a petition for review does not automatically stay execution of a deportation order, including cases where the court otherwise directs that there be no

or amend the right of judicial review to any class of deportable alien, including criminal aliens. Instead, Congress shortened the time in which to take an appeal and left it to the discretion of the courts of appeals as to whether such aliens should be granted stays of deportation pending review. As presently read by the court of appeals in this case, however, aliens would lose all judicial recourse for due process violations caused by illegal INS action (should a court of appeals deny a discretionary stay).

Amici propose that the reading urged by petitioner gives far more reasonable effect to these amendments than an interpretation which would allow INS to extinguish the continuing right to judicial review by invoking Section 106(a)(3) simply because it concluded that the alien's presence was not desirable and that involuntary deportation was preferable to judicial review. If the statute is read as Petitioner suggests, however, the quantity of review petitions not only would be likely to decrease, but their quality might well increase as aliens and their counsel would be given the full opportunity to consider the merits of seeking judicial review. Likewise, it would serve to eliminate the incentive for the INS to engage in sorts of tactical behavior that now permeate its efforts to deport aliens as quickly as possible. Finally, such a conclusion would more fairly balance and realize he dual interest in due process and effective enforcement of the law.

In any event, it is a certainty that the issues presented for review in this case will continue to recur frequently unless and until this Court resolves this these issues once and for all. *Amici* respectfully urge this Court to accept the opportunity to do so in this case.

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automatic stay, or those involving aliens convicted of an aggravated felony (including those for whom proceedings have been conducted under §242A(b), as amended September 13, 1994). In those instances, the statute mandates there be no stay upon the filing of a petition for review unless the court otherwise directs.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 94-1462

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

LUCAS P. BAEZ,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent's brief in opposition is far more significant for what it does *not* say than it is for what it contains. Respondent concedes that the circuits are divided as to the meaning of Section 106(c) of the INA and over the availability of post-deportation review. Respondent also does not deny that the questions presented implicate fundamental and important issues of statutory and constitutional law. Indeed, the need for this Court's immediate review is underscored by the *amicus curiae* brief filed by four separate *amici* in support of our petition. Perhaps most notably of all, respondent makes no attempt in its brief to defend either the holding or the reasoning of the court of appeals, or to challenge our principal contentions that § 106(c) forecloses judicial review only as to those aliens who have voluntarily departed the United States—not those who have been involuntarily deported—and that the court of appeals' contrary reading of the statute raises serious and unanswered constitutional questions that warrant review.

Rather than challenge the substance of our petition, respondent's brief in opposition attempts to argue that this case "is not an appropriate vehicle" for consideration of the questions presented. In fact, however, as we demonstrate below, *none* of the factual and legal arguments contained in respondent's brief have anything to do with the issues properly presented for review, or provide the slightest basis for denying review. Indeed, all of the grounds upon which review in this Court is sought remain unchallenged by respondent, thus confirming both that review of the questions presented is warranted, and that the decision of the First Circuit in this case is indefensible.

I. RESPONDENT'S BRIEF IN OPPOSITION MAKES NO EFFORT TO DEFEND THE COURT OF APPEALS' RULING AND INSTEAD ATTEMPTS TO EVADE REVIEW ON WHOLLY IRRELEVANT GROUNDS

A. Respondent's assertion that the procedural posture of this case makes review inappropriate is plainly incorrect. Respondent argues that this Court's decision in *Stone* v. *INS*, 115 S. Ct. 1537 (1995), deprived the court of appeals of jurisdiction to hear petitioner's appeal, thereby obviating the question of § 106(c)'s application to this case. Yet, respondent's own brief unequivocally demonstrates that these contentions are unfounded.

Respondent concedes (at 7) that petitioner filed a timely appeal to the court of appeals within 90 days of the BIA's denial of his motion to reopen. Respondent also concedes, as it must, that the First Circuit dismissed petitioner's appeal from the denial of his motion to reopen and from the BIA's underlying order of deportation *solely* because of the court's holding that it lacked subject matter jurisdiction under § 106(c). Br. In Opp. 5-6; Pet. App. 2a, 14a. The court of appeals' holding it did not have jurisdiction to even consider the appeal from the denial of the motion to reopen is the decision that we ask this Court to review in our petition. Whether the court would have had jurisdiction under *Stone* to review the BIA's original order of deportation in addition to its denial of the motion to reopen is irrelevant and would not affect this Court's consideration of the questions presented. As explained by the court of appeals (Pet. App. 5a n.4) in rejecting this contention:

> [w]e need not probe this point, for even if INS is correct in its view—a matter on which we do not pass—it has not argued that the petition for review is untimely as to the Board's jettisoning of the motion to reopen.

Although the First Circuit dismissed petitioner's appeal for lack of jurisdiction under § 106(c), respondent also attempts to defend the BIA's underlying rulings on grounds that the court of appeals held it lacked jurisdiction to consider under § 106(c). For example, respondent argues (at 9-10) that the BIA properly denied petitioner's motion to reopen, and that the its decision is subject to a deferential "abuse of discretion" standard of review. What respondent forgets, however, is that petitioner never got a *chance* to have the BIA's rulings considered by the court of appeals at all under any standard of review. The court never reached those issues given its holding that it was "powerless" to consider them under § 106(c) since petitioner already had been deported.[1]

Respondent also attempts to defend the BIA's denial of petitioner's motion to reopen by pointing to 8 C.F.R. § 3.2, claiming (at 9) that "there is no reasonable argument that the BIA abused its discretion in refusing to reopen the proceedings." Respondent's reliance on Section 3.2, however, begs the questions presented and confirms the need for guidance from this Court. Section 3.2 applies only to cases involving an alien's "departure" from the United States. The central question raised by the petition (at 16-20), however, is whether in both the INA and its accompanying regulations, the term

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[1] Respondent likewise argues (at 10) that "[b]ecause the only issue properly before the court of appeals was whether the BIA correctly construed its own regulation to preclude it from acting on petitioner's motion to reopen, the issue on which petitioner seeks review is not properly presented." Once again, however, respondent's argument fails to take account of the procedural posture of this case since the court of appeals never *reached* the question of whether the BIA properly denied petitioner's motion to reopen given its threshold ruling that it lacked jurisdiction. *That* is the question over which the circuits have split and on which review now is sought.

"departure" connotes only a *voluntary* departure from the United States, or is also applicable to involuntary deportations. Citing Section 3.2 does nothing to answer that question.

B. Similarly irrelevant are respondent's arguments that petitioner was not denied due process since (a) his counsel, in the few hours after his request for a stay of deportation was denied by the BIA and before his deportation was carried out, could have pursued other avenues for seeking a stay, and (b) his counsel allegedly was sent by respondent a copy of the BIA's final order of deportation. Both of these disputed factual issues are immaterial to the discrete questions of federal law on which review is sought, and would not have to be addressed by the Court at all in its review of those questions.[2]

Contrary to the suggestion in respondent's brief, petitioner is *not* asking this Court to hold that he was denied due process by virtue of his deportation without proper notice to his counsel. In fact, the petition does not challenge the propriety of petitioner's deportation *at all*. Instead, petitioner asks this Court to hold (1) that he did not lose his right to seek judicial review under § 106(c) simply because of his involuntary removal from the United States, and (2) that if he did lose that

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[2] Although not relevant to this appeal, it should be noted that respondent's factual assertions are largely devoid of record support. For example, respondent falsely implies that petitioner's counsel, who had changed addresses, never checked his mail at his old address. In fact, as the court of appeals found, uncontradicted evidence was offered below that petitioner's counsel *routinely* checked his mail at the address listed in the BIA's decision, and that a copy of the BIA's decision was never received. Pet. App. 6a. Respondent also falsely claims (at 7 n.6) that petitioner's motion to reopen was improper because it did not allege any new evidence. However, petitioner's motion *did* contain new evidence that his counsel had not been served with a copy of the Board's decision in violation of INS regulations.

right under § 106(c), the statute violates Article III and the Due Process Clause of the Fifth Amendment. Notably, respondent raises no challenge to *either* of these points. Indeed, respondent makes no attempt to defend the court of appeals' reading of § 106(c) at all other than its half-hearted assertion (at 10) that INS' interpretation of the term "departure" should be accorded "broad deference."

In sum, respondent's attempts to defend the First Circuit's ruling on grounds that the court itself found it had no jurisdiction to consider confirms that the court's jurisdictional holding cannot be defended. Through its brief in opposition, respondent obviously hopes to distract the Court by raising factual and legal issues that simply have nothing to do with the questions presented in the petition—both of which are properly presented for review in this case.

II. § 106(C) APPLIES ONLY TO VOLUNTARY DEPARTURES AND NOT DEPORTATIONS

The brief in opposition concedes (at 6) that the courts of appeals are deadlocked over the meaning of § 106(c). This split will not be resolved unless and until the Court provides definitive guidance as to the meaning of § 106(c) and the availability of post-deportation judicial review. In fact, as explained above, respondent notably makes no effort *at all* to defend either the holding or the reasoning of the First Circuit's decision below.

In the petition, we demonstrated that the terms "depart" and "deport"—used disjunctively throughout the statute—have different meanings. Pet. 18-21. Thus, as our supporting *amici* also demonstrate, § 106(c) does *not* apply to involuntary removals from the United States. See Br. of *Amici Curiae*, at 8-10, 16-19. Respondent makes no attempt to refute our reading of the statute. In short, the circuits are deeply divided over the meaning of § 106(c), and the *only* construction of the

statute that fully gives effect to its terms and is consistent with this Court's well-established principles of statutory construction is that § 106(c) does not apply to involuntary departures at all.

Unable to explain away the circuit split over the meaning of § 106(c), or to defend the holding of the court of appeals below, respondent argues that this Court should nevertheless deny review because petitioner's deportation was not carried out illegally and did not violate his right to due process. This argument fails for any number of reasons. As explained above, the particular circumstances of petitioner's deportation are irrelevant to the questions presented here. The primary legal issue for which review is whether § 106(c) applies to involuntary removals from the United States, including those cases where aliens have been deported illegally and in violation of their right to due process. Should this Court hold that § 106(c) applies only to voluntary departures, the circumstances surrounding petitioner's deportation would be immaterial. Alternatively, should the Court hold that § 106(c) is inapplicable where aliens are illegally removed from the United States, this Court likewise would not be called upon to resolve any of the disputed factual issues raised by respondent concerning the circumstances of petitioner's deportation.[3]

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[3] As we demonstrated in our petition (at 12-15), petitioner would have been accorded relief in each of the circuits that have recognized exceptions to § 106(c) given that his deportation was carried out without proper notice to his counsel and in violation of the notice requirements of 8 C.F.R. § 243.3. Respondent does not deny that such a deportation would be illegal and violate due process. Instead, it falsely suggests that "uncontested" evidence was offered below that respondent served a copy of the Board's order of deportation. Br. In Opp. 11. In fact, as noted by the court of appeals (Pet. App. 6a), respondent was unable to offer *any* actual evidence that the Board's order of deportation was sent (such as a transmittal letter or log book

Instead, such factual issues would properly be left for resolution on remand.

In the end, it remains fully apparent that the courts have not and will not be able to reach any consensus as to the meaning of § 106(c) and the availability of post-deportation review without guidance from the Court—guidance that the circuits themselves specifically have requested. *Bar-Levy v. United States Dep't of Justice*, 990 F.2d 33, 36 (2d Cir. 1993). Immediate review is also especially justified in this case because, as the brief of *amici* attests, the decision below has had real and serious consequences for immigrants and immigration practitioners who no longer have a confident understanding of the basic procedures that must be followed under § 106 to seek judicial review. The questions presented in this case raise fundamental and important issues of federal law that are certain to recur. Respondent's factual distractions aside, this case provides an ideal and long-awaited opportunity for the Court to resolve these issues.

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notation). Instead, it only offered the affidavit of an INS employee who lacked personal knowledge of this case as to the procedures usually followed for service of final deportation orders. Such evidence, however, courts has been rejected as providing proof that a final order has been served. See, *e.g.*, *Quedraogo v. INS* , 864 F.2d 376, 378 (5th Cir. 1989) (vacating order of dismissal since INS had not properly served a copy of BIA decision, noting that "[c]ounsel for the INS has been unable to locate any letter of transmittal or contemporaneous notation (such as an entry on a docket sheet) documenting the mailing of the . . . order").

III. AS READ BY THE COURT OF APPEALS, § 106(C) VIOLATES ARTICLE III AND THE DUE PROCESS CLAUSE

In the petition, we demonstrated that § 106(c), if read to categorically preclude judicial review of final orders of deportation even in the face of colorable due process claims, violates the guarantees of judicial review contained in both Article III and the Due Process Clause of the United States Constitution. Notably, respondent raises no challenge to this point except to argue on the merits that petitioner would not be able to establish a due process violation if afforded the opportunity to make such a showing. Once again, however, such arguments ignore the procedural posture of this case and fail to confront the threshold issues on which review is being sought.

In the petition, we explained (at 5) that the First Circuit, noting that "courts have split on the question of whether [§ 106(c)'s] jurisdictional bar is subject to a due process exception," ordered the parties to brief "the issue of whether counsel's eleventh-hour notice of the scheduled deportation might trigger a possible exception to [§ 106(c)] -- a matter of some dispute." Pet. App. 15a-16a. After briefing, the court held that it was "powerless" to consider petitioner's due process claim since "[a] judge-made exception to section [106(c)'s] jurisdictional, even one limited to 'colorable' due process claims--whatever that terms may eventually come to mean--can too easily expand to engulf the general rule prohibiting review and thereby thwart achievement of the congressional goal." Pet. App. 12a. Thus, the court made no findings as to whether or not an actual due process violation occurred in this case.

In its brief in opposition, respondent does not question the authorities cited in the petition which establish that a deportation carried out without proper notice to counsel violates due process. See Pet. 9-10. Instead, it merely argues (at 11) that petitioner "has no colorable claim of a due process

violation" because of "conflicting evidence" which it claims shows that petitioner's counsel was sent a copy of the BIA's final order of deportation. In fact, respondent's "evidence" was insufficient as a matter of law to show that it served a copy of the BIA's order of deportation on petitioner's counsel. See *supra* at 6 n.3. But in any event, respondent's brief at most proves that there exist material issues of fact that would have to be resolved to determine whether or not petitioner's deportation violated due process. As respondent well knows, these factual issues have *nothing* to do with the discrete legal issues presented for review, and provide no basis for evading further review of these important constitutional questions. See R. Stern, E. Gressman, S. Shapiro and K. Geller, SUPREME COURT PRACTICE § 4.14, at 190-91 (7th ed. 1993). Instead, such incidental factual issues would properly be left for remand should this Court hold that § 106(c) constitutionally cannot bar judicial consideration of colorable due process claims.

In the petition, we demonstrated (at 22-25) the confusion that now exists among courts and scholars as to the constitutional necessity of judicial review of agency action. We also cited several recent cases in which the Court has recognized this issue as a "serious" and "difficult question of constitutional law"—and one that the Court has yet to resolve. These points are uncontested by respondent. See *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986); *Superintendent v. Hill*, 472 U.S. 445, 450 (1985); *Johnson v. Robison*, 415 U.S. 361, 366-67 (1974). More importantly, though, respondent also makes no attempt to defend the constitutionality of § 106(c), let alone support the flawed constitutional reasoning offered by the court of appeals.

In sum, contrary to what respondent would have this Court believe, the question presented here is *not* whether petitioner's due process rights were violated in this particular case. Indeed,

petitioner never got the chance to have that claim considered given the court of appeals' threshold conclusion that it was powerless to entertain it. The issue properly presented for review is instead the basic question of whether the federal courts can constitutionally be barred by Congress from exercising jurisdiction to hear such claims. As *amici* explain, the time has come for the Court to resolve once and for all this fundamental question and to determine whether Congress may insulate an agency of the executive branch from judicial scrutiny, even to consider claims that the agency has violated the Constitution. This case provides an ideal opportunity to resolve this important and recurring question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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